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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Joseph B. Kauffman hereby petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on September 24, 1970 and amended herein on November 12, 1970.

OPINIONS BELOW.

The opinion of the District Court is not officially reported and is printed in the Appendix, pp. A3-A8. The opinion of the Court of Appeals is not yet officially reported and is printed in the Appendix, pp. A12-A26.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on September 24, 1970, Appendix, p. A27, and amended on November 12, 1970, Appendix, pp. A30-A31. On October 20, 1970, petitioner's timely petition for rehearing was denied, with two of the seven judges of the circuit in regular active service not participating in its consideration, Appendix, p. A29.[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

A. Does a customer-shareholder[2] of four mutual funds have standing to sue *in his own right* under Section 4 of the Clayton Act, 15 U. S. C. § 15, for damages which he sus-

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1. Although the Order sur petition for rehearing, Appendix, p. A29, indicates that only Judge Freedman did not participate, it appears that Judge Adams also did not participate.

2. Petitioner is referred to as a "customer-shareholder" because, unlike any shareholders of other corporations, persons who invest in mutual funds simultaneously are *customers* as well as shareholders, purchasing the *only* product of mutual funds, namely investment advice and diversity of investment risk, through the conduit of their investment in mutual funds.

tained as a result of violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. § 1 and § 2, where:

1. As a customer, he has been directly injured by defendants' antitrust violations?

2. The Investment Company Act of 1940, 15 U. S. C. §§ 80a-1 *et seq.*, which was expressly enacted for the benefit of customer-shareholders of mutual funds, and decisions thereunder, establish that a customer-shareholder of mutual funds has standing to sue *in his own right* as well as derivatively for *any* violations of law involving mutual funds?

B. Whether the conflict among the Courts of Appeals regarding standing to sue under Section 4 of the Clayton Act should be resolved by following the holdings of the Second and Third Circuits, which turn on the directness or indirectness of harm to the injured party, or by following the holdings of the Fourth, Eighth and Ninth Circuits, which refer to the location of the injured party within or without the "target area"?

C. Whether standing to sue under Section 4 of the Clayton Act should be more limited than standing to challenge administrative regulations promulgated by governmental agencies?

D. Under this Court's decision in *Ross v. Bernhard*, 396 U. S. 531 (1970), does a customer-shareholder of four mutual funds have standing to sue not only derivatively on behalf of his four funds but to exercise the conceded right of said four funds to commence a class action on behalf of all other mutual funds similarly situated in light of the importance of class actions to:

1. Effective enforcement of the antitrust laws by private parties?

2. Discouragement of a multiplicity of suits based on a wrong common to all members of a class similarly situated?

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved herein are Section 4 of the Clayton Act, Sections 1 and 2 of the Sherman Act and Section 1(b) of the Investment Company Act of 1940.

Section 4 of the Clayton Act, 15 U. S. C. § 15, provides:

> "Any person who shall be injured in his business or property *by reason of anything forbidden in the anti-trust laws* may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Boldface and emphasis supplied.)

Section 1 of the Sherman Act, 15 U. S. C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2 of the Sherman Act, 15 U. S. C. § 2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty . . ."

Section 1(b) of the Investment Company Act of 1940, 15 U. S. C. § 80a-1(b), provides in pertinent part:

> "Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission

made pursuant to section 79z-4 of this title, and facts otherwise disclosed and ascertained, it is declared that the national public interest and the interest of investors are adversely affected—

* * *

"(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders."

STATEMENT OF THE CASE

This action was instituted by petitioner, *inter alia*, under Section 4 of the Clayton Act, 15 U. S. C. § 15, for treble damages. The gravamen of petitioner's action was that defendants have engaged in a combination and conspiracy, with horizontal and vertical agreements, to fix management fees and to refrain from competition for the business of advising mutual funds and the business of obtaining investment advice in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. § 1 and § 2.

Petitioner, as a customer-shareholder of four mutual funds, commenced this suit both as a representative and as a derivative action against 65 mutual funds as nominal defendants, 38 investment advisers managing said 65 mutual funds, 37 self-dealing directors sitting simultaneously as directors or trustees of said 65 funds and 38 investment advisers, and the trade association representative for the mutual fund industry.

At the threshold, defendants moved to dismiss, *inter alia*, all antitrust claims commenced by petitioner *in his own right* on the ground that he lacked standing to sue since all the claims asserted by him were necessarily derivative in nature. Invoking traditional concepts of the shareholder-corporation relationship, defendants contended that petitioner could not maintain any antitrust claims *in his own right* since he was harmed only indirectly.

However, since mutual funds, unlike all other corporations, *must* redeem their shares at the option of their shareholders at *net asset value*, each shareholder of a mutual fund *owns* a proportionate share of the net assets of his fund represented by the number of shares owned by him at any particular time as compared to the total number of shares then outstanding.[3] Arthur Wiesenberger Serv-

3. In order to arrive at a net asset figure, all liabilities, including management fees, are subtracted from gross assets.

ices, Investment Companies, p. 17 (1969 Ed.); Wharton School of Finance and Commerce, A Study of Mutual Funds, p. 6 (1962). Furthermore, defendants' motions ignored the critical economic fact that, unlike any other corporation, the customers buying the services of mutual funds and the shareholders of mutual funds are *identical*. Thus, petitioner's action focused on grossly excessive management fees, or the *charge* to mutual fund customer-shareholders for obtaining diversity of investment risk and professional management through the conduit of their mutual fund investments. *Hearings, Mutual Fund Legislation of 1967*, Part 2, p. 672; *Hearings, Mutual Fund Amendments of 1969*, Part 1, p. 430.

Moreover, defendants contended that petitioner could not maintain his suit as a class action on behalf of the 61 mutual funds in which he did not own shares.

The District Court denied defendants' motions, but certified its decision for appeal pursuant to 28 U. S. C. § 1292(b); Appendix, pp. A3-A9. The Court of Appeals permitted defendants to appeal, Appendix, p. A10, and, subsequently, reversed the District Court, holding *as a matter of law* that:

1. Petitioner could not maintain a claim in his own right under Section 4 of the Clayton Act because he was a shareholder (Appendix, pp. A15-A18); and

2. Petitioner could not bring a class action on behalf of the 61 mutual funds in which he did not own any shares (Appendix, pp. A19-A24), even though he had a right to bring a derivative action on behalf of the four mutual funds in which he owned shares (Appendix, p. A19) and even though those funds had the right to commence an action on behalf of all other funds similarly situated (Appendix, p. A24).

In short, the Third Circuit summarily dismissed petitioner's claims *as a matter of law* without according him *any* opportunity for discovery on the merits and, concomitantly, without according him *any* opportunity to demonstrate the propriety of his standing to sue in his own right under Section 4 of the Clayton Act. Significantly, the decision of the Third Circuit conflicts with this Court's repeated admonition to eschew summary dismissals of antitrust claims, *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700, 704 (1969), *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), and to avoid decisions which disregard "the economic reality of the relevant transactions." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 208 (1968).[4]

4. The Third Circuit totally ignored the economic reality that shareholders of mutual funds are *customers* as well as shareholders.

REASONS FOR GRANTING THE WRIT.

A. This Petition Raises Important Questions Regarding Private Enforcement of Antitrust Policy.

As declared by this Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 139 (1968), "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." Accordingly, this Court has always emphasized approaches which effectuate, rather than emasculate, private enforcement of antitrust policy:

> "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . *The Act is comprehensive in its terms and coverage*, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948). (Emphasis and boldface supplied.)
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> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an *aggrieved party* . . . In the face of such a policy *this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.*" *Radovich v. National Football League*, 352 U. S. 445, 453-454 (1957). (Footnote omitted and emphasis supplied.)

Indeed, as recently recognized by the Ninth Circuit in *Mulvey v. Samuel Goldwyn Productions*, 1970 Trade Cases ¶ 73,361 at p. 89,450 (1970):

"We turn to Goldwyn's standing argument. In pertinent part, section 4 of the Clayton Act provides: 'Any person who shall be injured in his . . . property *by reason of* anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . .' (Emphasis added.) The italicized language has been judicially construed to embrace not only the legal causation element, but also the standing concept, which in this setting is a close relative of causation. *It is a relationship that has not received a blessing by the Supreme Court.*" (Emphasis supplied.)

Nonetheless, several Courts of Appeals have construed Section 4 of the Clayton Act as incorporating a standing prerequisite. Both the Third Circuit and the Second Circuit have adopted a restrictive standing test which turns on whether or not the plaintiff has been directly injured. If it is determined that the plaintiff has been indirectly injured, standing is denied and the complaint is dismissed, irrespective of the fact that plaintiff has been injured and has a meritorious claim. See, *e.g.*, *Fields Productions, Inc. v. United Artists Corp.*, 1970 Trade Cases ¶ 73,329 (2d Cir. 1970); *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F. 2d 183 (2d Cir. 1970).

In the Court of Appeals, petitioner contended, *inter alia*, that the grossly excessive management fees charged mutual funds by investment advisers *necessarily* reduced on a *pro rata* basis the net asset value of his shares because of his undisputed right at any time to redeem his shares at net asset value. Although the Court of Appeals accepted this factual contention, as it must at this stage of the proceedings in considering a motion to dismiss, it denied him standing to sue solely on the ground that it could not alter the traditional concepts of the shareholder-corporation relationship (Appendix, p. A16):

> "That the worth of a share of appellee's stock is directly proportionate to the value of a mutual fund's net assets is insufficient to destroy these separate identities, to alter the basic shareholder-corporation relationship, and to thereby confer upon appellee legal rights peculiar to the corporation."

By applying the antitrust laws on the basis of rigid, artificial concepts of corporation law and by disregarding petitioner's status as a *customer* as well as a shareholder, contrary to this Court's decision in *United States v. Concentrated Phosphate Export Assn., Inc., supra*, which directed lower courts to base their decisions on "the economic reality of the relevant transactions," the Court of Appeals concluded that petitioner's shareholder status deprived him of standing to sue in his own right, although he was a "person . . . injured in his business or property" (Appendix, pp. A17-A18):

> "It being established that appellee's alleged injury is by definition 'indirect,' his attempt to prosecute this action in his own right, as a shareholder, cannot succeed. Efforts to characterize the harm as 'direct,' or, argument that 'proximate harm' is sufficient or that appellee is 'within the sector of the economy in which the violation threatened a breakdown of competitive conditions,' *South Carolina Council of Milk Products, Inc. v. Newton*, 360, F. 2d 414, 418 (4th Cir.), *cert. denied* 385 U. S. 934 (1966), are simply unavailing in light of *Ash*. Indeed, appellee has cited no case in which a shareholder has achieved standing to remedy the type of harm portrayed here."

On the other hand, both the Fourth and Ninth Circuits have adopted the more liberal "target area" test in determining whether or not a plaintiff has standing to sue under

Section 4 of the Clayton Act. Under this test, no single or exclusive cause of action is created and standing is conferred on all plaintiffs who are within "the area which it could reasonably be foreseen would be affected" by the antitrust violations, irrespective of the indirectness of the injury. See, *e.g.*, *Mulvey v. Samuel Goldwyn Productions*, *supra*; *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414 (4th Cir. 1966) *cert. denied* 385 U. S. 934 (1966).

In *Mulvey*, *supra*, the Ninth Circuit held that, under Section 4 of the Clayton Act, a seller of five motion pictures had standing to sue his purchaser for block booking his movies to television since it was "entirely foreseeable that [his purchaser's] block booking could impair the profit potential of [the seller's] films, thus depreciating the value of [the seller's] contractual interest in the film's revenue." 1970 Trade Cases ¶ 73,361 at p. 89,450.

Similarly, the Fourth Circuit in *South Carolina Council*, *supra*, held that an association of milk producers had standing to sue under Section 4 of the Clayton Act even though the milk producers did *not* sell directly to defendants, defendants were *not* producers in competition with the milk producers, and the milk producers' commodity was *raw* milk whereas defendants' commodity was processed milk. In short, the Fourth Circuit established a standing test which disregarded legal form for economic substance.

Finally, the Eighth Circuit in *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F. 2d 679 (8th Cir. 1966) adopted a standing test which is virtually identical to the causation criterion of Section 4 of the Clayton Act. There, defendants attacked Bergjans' standing to sue because it was a processor that sold *all* of its production to an identically owned sales company, which was *not* a party therein. Relying on the nature of the relationship between Bergjans

and its sales company, the Court held that Bergjans' injury was nevertheless cognizable under Section 4 of the Clayton Act and that "it would be less than realistic to say that Bergjans is not one which § 4 of the Clayton Act, 15 U. S. C. § 15, is designed to protect." 368 F. 2d at 689.

The incorporation of a restrictive standing test as a prerequisite to the invocation of Section 4 of the Clayton Act obviously dilutes, if not destroys, "the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. at 136.

In *Perkins v. Standard Oil Co. of California*, 395 U. S. 642, 647 (1969), this Court indicated that the imposition of artificial limitations on Section 2 of the Clayton Act, 15 U. S. C. § 13, were "completely unwarranted by the language or purpose of the Act." Thus, despite the fact that the plaintiff, a competitor of a customer of a customer of a customer of a supplier, was remotely located on the "fourth level," he was permitted to maintain his action (395 U. S. at 648):

> "From Perkins' point of view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer."

In conclusion, this Court should grant this petition in order to resolve the conflict among the Courts of Appeals in construing Section 4 of the Clayton Act and in order to squarely address itself to the issue raised by Judge Waterman in his cogent dissent in *Billy Baxter* (431 F. 2d at 191):

> "There seems to have emerged from a major portion of the cases interpreting the antitrust statutes a talismanic rule of lack-of-standing, presumably based in

some fashion upon those now famous words 'by reason of.' If the plaintiff suffers injury from the defendant's illegal antitrust conduct, but the plaintiff is somehow separated from the defendant by the presence of an intermediate person who has also fallen victim to that conduct, the plaintiff's injury is given the label of an 'indirect,' 'remote,' or 'consequential' injury. The label then dictates the outcome of the case and the plaintiff is denied a recovery regardless of the extent or the nature of plaintiff's loss, or of any other facts and circumstances, and regardless of whether a fiduciary relationship existed between plaintiff and the intermediate person. Many courts, so accepting label disposition, have tended thereby to view the standing-to-sue requirement in general terms and thus have denied all plaintiffs who fall into certain classes of persons—lessors, landlords, stockholders, corporate officers, creditors, suppliers, franchisors, licensors—antitrust protection by holding that when the business and property interests of such plaintiffs are injured because of injuries to the competitive market of persons with whom they are related or connected the plaintiffs' position vis-a-vis the offending defendants is 'indirect.' . . . [I]t seems to me that perhaps the use by courts in antitrust opinions of inherited decisional labels may have obfuscated the positions of some plaintiffs so as to have denied them the recoveries which fact-analysis might have indicated they should have obtained."[5]

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5. The plaintiff in *Billy Baxter* has already filed a petition for a writ of certiorari.

B. The Standing Test Adopted by the Court Below Is More Restrictive Than the Standing Test Sanctioned by This Court in Its Recent Decisions.

In three recent decisions, this Court has conferred standing on private plaintiffs challenging administrative regulations where such regulations have caused them injury and where they have been within the zone of interests embraced by the regulations in question. *Arnold Tours, Inc. v. Camp*, — U. S. — (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150 (1970); *Barlow v. Collins*, 397 U. S. 159 (1970). In light of these three decisions, the Third Circuit's attempt to distinguish between standing and stating a cause of action is patently erroneous (Appendix, p. A17). If the Third Circuit had limited its concern to traditional notions of standing, petitioner's standing to sue would be beyond contest since defendants' actions have caused him injury and since petitioner is within the zone of interests encompassed by the statutes in question.

Indeed, the Investment Company Institute, the trade association representative for the mutual fund industry and a defendant herein, recently filed a reply brief in *Investment Company Institute v. Camp*, Oct. Term, 1970, No. 61, in which it argued:

> "This Court has, in a consistent course of recent decisions, liberalized the doctrine of standing, which had previously been applied to bar injured persons from challenging allegedly illegal governmental actions. [Cases cited.] These decisions reflect the 'trend . . . toward enlargement of the class of people who may protest administrative action.' [Case cited.] Recently, this Court expressly discarded the 'legal interest' test as a condition of standing . . ." Securities Regulation & Law Report, No. 78, Nov. 25, 1970, p. F-9.

Nonetheless, in the case at bar, defendants and the Court of Appeals have restricted the class of injured persons who may challenge antitrust violations.

Thus, this Court should grant this petition in order to remedy the incongruous situation in which standing under the antitrust laws is more narrowly conferred than under recent decisions of this Court permitting private challenges to administrative regulation by governmental agencies.

C. The Decision Below Vitiates the Congressional Concern Underlying the Investment Company Act of 1940.

In the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1 *et seq.*, Congress has clearly indicated that its primary concern was to protect investors in investment companies, that is, mutual fund customer-shareholders. Indeed, in Section 1, "Findings and Declaration of Policy," Congress stated that "the national public interest and the *interest of investors* are adversely affected" (15 U. S. C. § 80a-1(b)) (emphasis supplied):

> "(2) When *investment companies are organized, operated, managed,* or their portfolio securities are selected, *in the interest of directors, officers, investment advisers,* depositors, or other affiliated persons thereof, . . . or *in the interest of other investment companies* . . . rather than in the interest of all classes of such companies' security holders [*i.e.*, their customer-shareholders]." (Emphasis supplied.)

In sum, Congress declared that its "policy and purposes" were "to mitigate and, so far as is feasible, to eliminate the conditions enumerated in [Section 1] which adversely affect the national public interest and the *interest of investors.*" 15 U. S. C. § 80a-1(b). (Emphasis supplied.)

Thus, Congress concluded that the customer-shareholders of mutual funds, *i.e.*, investors in investment com-

panies, are the *primary victims* of mismanagement of mutual fund assets. Several courts have affirmed this congressional conclusion. See, *e.g.*, *Brown v. Bullock*, 194 F. Supp. 207, 245 (S. D. N. Y. 1961) *aff'd* 294 F. 2d 415 (2d Cir. 1961) (*en banc*); *Greater Iowa Corp. v. McLendon*, 378 F. 2d 783, 793-794 (8th Cir. 1967). Most recently, the Fifth Circuit in *Herpich v. Wallace*, 430 F. 2d 792, 816 (1970) stated:

> "From a reading of the 'Findings and Declarations of Policy' in section 1, as well as of the substantive provisions of the Act, we think it is clear in light of the circumstances under which the Act was passed that Congress intended to provide a comprehensive regulatory scheme to correct and prevent *certain abusive practices in the management of investment companies for the protection of persons who put up money to be invested by such companies on their behalf.*" (Emphasis supplied.)

With the specific congressional concern for the interests of customer-shareholders of mutual funds provided by the Investment Company Act of 1940, outmoded concepts of corporate law must not be woodenly invoked to deny standing to mutual fund customer-shareholders who have had *their assets* reduced because of defendants' violation of the antitrust laws in fixing grossly excessive management fees.

Accordingly, Courts of Appeals have held that mutual fund customer-shareholders have claims *in their own right* for violations of the Investment Company Act of 1940. *Herpich v. Wallace, supra; Esplin v. Hirschi*, 402 F. 2d 94, 103 (10th Cir. 1968) *cert. denied* 394 U. S. 928 (1969); *Brown v. Bullock*, 194 F. Supp. at 229-233. There is no rational basis for depriving the very same customer-shareholders of standing to sue *in their own right* merely because their

claims arise under the antitrust laws, particularly when their claims involve the very same subject matter which motivated the congressional concern reflected by the Investment Company Act of 1940.

Furthermore, from its inception, the mutual fund industry, unlike any other, has been characterized by an absence of competition in the fixing of management fees. As Hamer H. Budge, Chairman of the SEC, has stated:

> "This pattern is commonly referred to as one of external management. It is the traditional way of doing things in the investment company field, but it is hard to conceive of anything like it anywhere else . . . Mutual funds just do not go out to buy advisory . . . services on the open market on the best terms they can get. They are generally tied to their advisers. *The adviser sets his price and, typically, the fund pays that price. The arm's-length bargaining element in the ordinary business relationship is completely lacking here.*
> "The structural arrangements found in this industry create an economic environment in which *normal market restraints on managerial compensation are conspicuous by their absence.* This is a situation in which insiders usually bargain with themselves. *In this type of system, legal controls are needed in order to do what normal market forces can be depended on to do elsewhere.*
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> ". . . whatever competition there has been in the industry has historically been for sales, and recently for performance, *but never for lower advisory fees . . .*" *Hearings*, Mutual Fund Legislation of 1969, Part 2 at pp. 855, 858. (Emphasis supplied.)

If the decision of the Third Circuit were permitted to stand, the entire mutual fund industry would be permitted

to continue without competition and the congressional concern underlying the enactment of the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1 *et seq.*, would be vitiated.

D. This Petition Raises Important Questions Regarding the Scope of This Court's Decision in Ross v. Bernhard, 396 U. S. 531 (1970) and Regarding Rule 23 of the Federal Rules of Civil Procedure.

In *Ross v. Bernhard*, 396 U. S. 531, 540 (1970), this Court held that "it is no longer tenable for a district court . . . to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors." In *Ross*, this Court made it crystal clear that in a derivative suit, "[t]he claim pressed by the stockholder against directors or third parties 'is not his own, but the corporation's'. . . . The heart of the action is the corporate claim." 396 U. S. at 538-539.[6] Thus, it was erroneous for the Third Circuit to hold that a mutual fund customer-shareholder could not enforce the right of his four funds to commence a class action on behalf of all other mutual funds similarly situated, particularly after it was conceded that "if the fund itself sought to bring a class action on behalf of other funds similarly situated, there would be no theoretical barrier prohibiting such a class action." Appendix, p. A24.[7]

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6. Nevertheless, in rejecting petitioner's attempt to enforce the right of his four funds to bring this action on behalf of all other mutual funds similarly situated, the Third Circuit stated that "[a] shareholder can only require a corporation to initiate a matter to protect the rights of a shareholder *qua* shareholder." Appendix A, p. A24.

7. All mutual funds which comprise the class are dominated and controlled by their investment advisers and self-dealing directors and, therefore, are devoid of volition to correct the abuses prevailing in the mutual fund industry.

In sum, pursuant to this Court's decision in *Ross v. Bernhard, supra:* (1) a shareholder suing on behalf of a corporation may bring all suits which a corporation could commence but for the refusal of its officers and directors; (2) a corporation could commence a class action on behalf of all other corporations similarly situated; and, therefore (3) a shareholder may enforce the rights of his corporation to commence a class action on behalf of all other corporations similarly situated.

Finally, contrary to the decision of the Third Circuit, Appendix, p. A22, Rules 23 and 23.1 are not mutually exclusive. As recognized by this Court, derivative stockholders' actions have always been considered analogous to "true" class actions. *Ross v. Bernhard*, 396 U. S. at 541; 2 *W. Barron & A. Holtzoff, Federal Practice and Procedure* § 562.1 (Wright ed. 1961).

Furthermore, both Rule 23 and Rule 23.1 have always been liberally applied in order to avoid multiplicity of suits and to provide compensatory or injunctive relief to large numbers of claimants. See, *e.g., Kahan v. Rosenstiel*, 424 F. 2d 161, 169 (3d Cir. 1970) *cert. denied* — U. S. — (1970); *Green v. Wolf Corp.*, 406 F. 2d 291, 298-298 (2d Cir. 1968) *cert. denied* 395 U. S. 977 (1969); *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 560-563 (2d Cir. 1968). As the Court stated in *Eisen*, an action commenced under Section 4 of the Clayton Act for violations of Sections 1 and 2 of the Sherman Act (391 F. 2d at 560):

> "Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation."

The importance of the private suit in the enforcement of the vital national policies underlying the antitrust laws is further enhanced when such suits are brought as class actions, for, as the court recognized in *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 493-494 (N. D. Ill. 1969), "[u]pholding the national class action will facilitate private antitrust litigation and will discourage future conspiracy violations."

In addition, discouragement of class actions can only lead to inefficient judicial administration. Indeed, "[t]he very purpose to be served by a class action is the opportunity it affords **to prevent a multiplicity of suits based on a wrong common to all** . . ." *Green v. Wolf Corp.*, 406 F. 2d at 300. (Boldface supplied.) As the Court stated in *Green* (406 F. 2d at 301):

> ". . . If a class action is markedly superior to all the alternatives, then, at least at the early stages of the litigation, we should *construe broadly* the other elements of Rule 23, to permit the efficient enforcement of 10b-5 [here the antitrust laws] through class actions with appropriate safeguards . . .
>
> ". . . We recognize that this might, in cases such as this, place additional burdens on judges but the *alternatives are either no recourse for thousands of stockholders to whom the courthouse would thus be out of bounds or a multiplicity and scattering of suits with the inefficient administration of litigation which follows in its wake.*" (Emphasis supplied.)

The avoidance of a multiplicity of actions and the concentration of litigation in one forum referred to in *Green, supra*, is not an abstraction:

> "The history of the schoolbook conspiracy cases . . . shows that after one court ruled that a class action was

> not proper . . . such a plethora of suits were filed all over the country that the machinery of the Panel on Multi-District Litigation had to be called upon to disentangle the jumble." *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 503 (N. D. Ill. 1969).

The same multiplicity of suits will follow herein unless the decision of the Court of Appeals is overturned.

Accordingly, the decision of the Court of Appeals will deter effective enforcement of the antitrust laws by private parties and will promote inefficient judicial administration by compelling the filing of a multiplicity of suits throughout the country. The Multidistrict Litigation Panel then will be required to unravel the morass of litigation by consolidating all of the actions in one forum, which was precisely petitioner's objective herein. See the Multidistrict Litigation Act, 28 U. S. C. § 1407.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that on this 22nd day of December, 1970, three copies of the Petition for a Writ of Certiorari were served, by first class mail, postage prepaid, on each of the following attorneys:

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I further certify that all parties required to be served have been served.

/s/ Bruce W. Kauffman,
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APPENDIX.

Order of the United States District Court for the District of New Jersey Filed on October 1, 1969.

WHEREAS, defendants moved to dismiss the complaint on the grounds that (1) plaintiff is not an adequate representative of the mutual investment funds which he purports to represent pursuant to *Rules* 23 and 23.1, *F. R. Civ. P.*; (2) plaintiff cannot maintain this action on behalf of individual shareholders as his claim for damages is a derivative action and any recovery would be solely for the benefit of the named mutual investment funds; (3) Counts I, II and III should be dismissed as they seek relief by the plaintiff on behalf of mutual investment funds of which he is not a shareholder and on behalf of shareholders of funds of which he is not a common shareholder; and (4) to dismiss Counts II and III of the complaint, except to the extent that plaintiff is a shareholder of certain named defendants, on the grounds that any duties imposed by the *Investment Company Act of 1940*, 15 *U. S. C.* §§ 80a-1 *et seq.*, are legal obligations owed only to mutual investment fund advisers and directors for the benefit of shareholders of such funds and not to strangers to such mutual investment funds; and

WHEREAS, upon these four motions defendants have not carried the required burden of proof for the dismissal of the complaint, or certain counts thereof, particularly when terminal relief is sought pending pretrial discovery in this complex, anti-trust litigation;

Now, Therefore, it is on this 30th day of September, 1969 Ordered that the above enumerated four motions for the dismissal of the complaint, or certain counts thereof, be and the same are denied hereby without prejudice to their renewal at an appropriate time later in these proceedings.

Mitchell H. Cohen,
Mitchell H. Cohen, *Judge*,
United States District Court.

Memorandum Opinion of the United States District Court for the District of New Jersey Filed on December 18, 1969.

COHEN, *District Judge:*

This is a motion by certain of numerous defendants, supported and resisted by briefs and arguments, upon rehearing, *General Rule* 12-I, *U. S. D. C. N. J.*, urging a reconsideration of this Court's Order filed October 1, 1969 which denied their four motions to dismiss the complaint as to them; alternatively, defendants petition for certification pursuant to 28 *U. S. C.* § 1292(b).

The complaint is stated in three counts. In Count I, brought under the *Sherman and Clayton Acts*, 15 *U. S. C.* § 1, *et seq.*, plaintiff seeks the following relief: (a) treble damages for himself, (b) for each member of a class which he purports to represent, (c) for each of the defendant externally managed mutual funds, (d) for each member of the class mentioned in (c), (e) a final injunction restraining the defendants from paying or receiving grossly excessive management fees, and (f) costs and counsel fees; in Count II, brought under the *Investment Company Act of 1940*, 15 *U. S. C.* § 80a-1 *et seq.*, he seeks the same treble damages and equitable relief for himself and others as in Count I; and in Count III, brought under the *Securities Exchange Act of 1934*, 15 *U. S. C.* §§ 78a *et seq.*, the *Investment Advisors Act of 1940*, 15 *U. S. C.* §§ 80b-1 *et seq.* and under the *Investment Company Act of 1940*, 15 *U. S. C.* §§ 80a-20, 80a-33, he demands such damages as are determined to have been sustained by him and the classes which he purports to represent. In essence, the plaintiff maintains that the defendant management and investment advisors, be they corporate or individual, as well as the alleged "self-dealing" directors of the externally managed mutual funds, conspired to fix grossly excessive fees, thereby illegally monop-

olizing the mutual funds investment market, all to his damage, and to that of the classes, both mutual and shareholder, which he purports to represent.

The four motions[1] which were reargued and reconsidered were those challenging the legal standing and capacity of the plaintiff to maintain his complaint which is based upon alleged violations of the *Antitrust* and *Securities Laws* of the United States and upon conspiracies to violate the same. In support of their motions, the defendants urged the following: (1) that inasmuch as the plaintiff is a shareholder in *only four* of the defendant mutual funds,[2] he does not fairly and adequately represent the interests of all other funds or their shareholders as required by *Rules* 23 and 23.1, *F. R. Civ. P.*; (2) he cannot individually or representatively assert claims on behalf of individual shareholders of mutual funds, as such claims are necessarily *derivative* in nature and thus for the benefit of the corporations alone, *Rule* 12(b)(6), *F. R. Civ. P.*; (3) he cannot maintain this action to the extent that it seeks relief in Counts I, II and III of the complaint, (a) on behalf of mutual funds of which he is not a shareholder, (b) on behalf of shareholders of said funds of which he is not a shareholder because one may not maintain a legal action on behalf of a corporation or its shareholders, unless he is a shareholder of such corporation, *Rules* 12(b)(6), 23 and 23.1, *F. R. Civ. P.*, and (4) Counts II and III of the complaint fail to state claims upon which relief can be granted in that the conspiracy alleged, even if true, would not violate either the *Antitrust*, *Security Exchange* or *Investment Company Acts*.

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1. These constitute the first set of many motions filed by the defendants, the balance of which are directed to, among other matters, jurisdiction, venue and process and which were held in abeyance pending disposition of these motions.

2. Plaintiff is a shareholder in the defendants, The Dreyfus Fund, Inc., Fidelity Fund, Putnam Growth and Manhattan Funds.

In the alternative, the moving defendants petition for a permissive certification, pursuant to 28 *U. S. C.* § 1292(b), on the ground that the Order denying their motions to dismiss "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." as to them and as well as to some 129 other defendants with whom plaintiff has no mutual shareholder relationship and which, if granted, will reduce the case to a derivative antitrust action shorn of the attempted representative class counts. Moreover, the defendants argue that a determination that this action is to proceed under the antitrust or securities laws (including the investment and advisors statutes) as a derivative one will substantially reduce the problems of jurisdiction, venue and process lurking in the other pending motions.[3]

Full and careful reconsideration has been given to the arguments advanced by able counsel upon rehearing. Nevertheless, this Court is of the conviction that nothing has been adduced which might lead to a conclusion and ruling different from its Order of October 1, 1969.[4] When

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3. The antitrust statutes distinguish between individuals (15 U. S. C. § 15), requiring personal jurisdiction by territorial process, and corporations (15 U. S. C. § 22) who may be reached with process for jurisdictional purposes if such a corporation can be "found" within the federal district forum, is an "inhabitant" thereof, or has been or is "transacting business" therein. The Securities Acts make no such distinctions. These considerations are most pertinent to some of the remaining motions and may, to a large extent, be dependent upon or resolved by the present motions.

4. The Order dated September 30th and filed October 1, 1969, contained an unfortunate choice of words when it made reference to "pretrial discovery" at this juncture of the proceedings. It was not intended to relate discovery to the four motions which were denied, but rather to certain remaining motions which may require extensive factual inquiry. To that extent it will be amended to delete that phrase.

that Order was entered denying the four motions, the Court was of the opinion, as it is now, that: (a) plaintiff does fairly and adequately represent claims on behalf of individual shareholders of the defendant mutual funds, not being limited to those of which he is himself a shareholder, nor confined to the assertion of only derivative, as distinguished from nonderivative or representative claims; that (b) this action may be maintained at least as a "hybrid class" action, a class yet to be ascertained, in order to reach and dispose of other motions involving jurisdiction, process and venue; and that (c) the conspiracy charge of the complaint directed against all investment advisors, be they corporate or individual, and against the alleged "self-dealing" directors can be maintained by the plaintiff subject, of course, to an immediate resolution of other pending motions and ultimately to a determination of whether the conduct of defendants, or any of them, violates the *Antitrust* or *Securities Acts* or both. Manifestly, in the role in which plaintiff places himself, he is in effect an "ancillary force" supplementing governmental enforcement of the *Antitrust* and *Securities Laws*. *Knuth v. Erie-Crawford Dairy Corp. Ass'n.*, 395 F. 2d 420, 423 (3 Cir. 1968). Moreover, inasmuch as the directors of the externally managed mutual funds have been charged by the plaintiff as "self-dealing," it should be inferred that in all probability they would not institute this action nor, because a charge of conspiracy has been levelled, is it likely that the shareholders could persuade their respective directors to do so on their behalf or that of their own mutuals. Several cases have upheld class actions of spurious or hybrid-class character and of national extent where the plaintiff could not claim an interest in each member of the class. *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2 Cir. 1968); *Illinois v. Harper & Row Publishers, Inc.*, 1969 Trade Cases § 72,795 (N. D. Ill.

1969); *Philadelphia Electric Co. v. Anaconda Amer. Brass Co.*, 43 FRD 452 (E. D. Pa. 1968); *City of Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506 (E. D. Pa. 1965).

Although the Court's prior ruling denying the defendants' motions to dismiss the complaint, or certain counts thereof, remains unchanged upon rehearing, nevertheless, it is the opinion of the Court that the said Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation in this complex, potentially protracted and probable multi-district antitrust and securities action, thereby avoiding great expenditures of time and money for pretrial procedures. These motions do go to the merits of the litigation in the sense that they strike at plaintiff's legal capacity to sue certain defendants in the very first instance. Further, whether or not these large mutual funds should be put to the prohibitive expense of defense, when the plaintiff's status to maintain such an action against certain of them is challenged as a matter of law, is an issue which should receive early resolution. In these circumstances, one is mindful of Judge Maris' admonition in 1958, expressed in *Milbert v. Bison Laboratories*, 260 F. 2d 431 at page 433, when *Section* 1292(b) of *Title* 28, *United States Code*, was but two months old:

> ". . . Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation. Both the district judge and the court of appeals are to exercise independent judgment in each case and are not to act routinely."

See also: *Freedman v. Phila. Terminals Auction Co.*, 197 F. Supp. 849 (E. D. Pa. 1961), aff'd 301 F. 2d 830 (3 Cir. 1962), *cert. den.* 371 U. S. 829 (1962); *King v. Grand Lodge of Inter'l. Ass'n. of Machinists*, 215 F. Supp. 351, 355 (N. D. Cal. 1963); aff'd 335 F. 2d 340 (9 Cir 1964), *cert. den.* 379 U. S. 920 (1964), where the denial of a motion for summary judgment which challenged the plaintiffs' rights to sue, as a matter of legal capacity, for alleged improper discharges from union offices was held to be properly certified because it involved a controlling question of their rights to relief on three of six causes of action.

The instant case is not an ordinary one—it is, rather, one of great dimension involving, as it does, some 141 defendants and makes an attack nationwide upon the entire mutual fund industry and demands damages in many millions of dollars. Consequently, and particularly in a case of this magnitude, the possibility of judicial error warrants the grant of a certificate for interlocutory appeal in the interest of avoiding needless and large expenditures of time and money by these defendants and, perhaps more importantly, the adverse exposure of their reputations and public images in today's hyper-sensitive financial markets. In such an event, if there be error, it seems better by far for a trial court to err upon the side of procedural liberality rather than succumb to considerations of rigid conservatism. In these circumstances, certification of appeal seems most appropriate at this critical juncture and well within the sphere of interlocutory appeal provided by Congress for extraordinary litigation.

Accordingly, an order so certified shall be granted and is entered herewith.

MITCHELL H. COHEN,
Mitchell H. Cohen, *Judge,*
United States District Court.

Order of the United States District Court for the District of New Jersey Dated December 18, 1969.

This matter having been brought on by counsel for defendants for reconsideration of motions denied by Order filed October 1, 1969, and reargument having been made by opposing counsel; and

The Court being satisfied that nothing has been adduced which should lead it to a different ruling, except that the phrase in the prior Order reading "pending pretrial discovery" should be deleted;

Now, therefore, it is on this 18th day of December, 1969, upon reconsideration, ORDERED that the defendants' motion for a redetermination of this Court's prior order filed October 1, 1969 is denied hereby; and

It is further ORDERED that the phrase "pending pretrial discovery" in the said Order be deleted and deemed amended to that extent only; and further

It is certified that, in the opinion of the Court, the ruling on said motions involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal may materially advance the ultimate disposition of this protracted, complex, expensive and extraordinary litigation with respect to many, if not most, of the parties-defendant hereto; and consonant therewith,

It is further ORDERED that all proceedings in this Court be stayed until further order by the United States Court of Appeals for the Third Circuit, or this Court.

MITCHELL H. COHEN,
Mitchell H. Cohen, *Judge*,
United States District Court.

Order of the United States Court of Appeals for the Third Circuit Dated January 22, 1970.

Present: FORMAN and SEITZ, *Circuit Judges.*

Upon consideration of petitioner's application in each of the above-entitled cases, for permission to appeal pursuant to the provisions of 28 U. S. C. Section 1292(b), and the answer in opposition thereto,

It is ORDERED that leave be, and hereby is granted to petitioner to appeal from the interlocutory order of the District Court for the District of New Jersey, entered October 1, 1969, and the interlocutory order of the said District Court, filed December 18, 1969, which order affirmed and modified the said order filed October 1, 1969, all in the case of Joseph B. Kauffman, etc. v. The Dreyfus Fund, Inc. et al., Civil No. 1348-68. / See the provisions of Rule 5(d), Federal Rules of Appellate Procedure.

By the Court,

PHILLIP FORMAN,
Circuit Judge.

Dated: January 22, 1970

Order of the United States Court of Appeals for the Third Circuit Dated April 10, 1970.

Present: SEITZ and ALDISERT, *Circuit Judges*, and LATCHUM, *District Judge*.

Upon consideration of appellee's motion to expedite appeals, and appellants' response in opposition thereto, and appellants' cross-motion for extension of time to file brief, and appellee's response in opposition thereto, all in the above-entitled cases, and it appearing that appellants have elected to proceed under the provision of Rule 30(c), F. R. A. P.,

It is ORDERED that the following briefing schedule be followed by appellants and appellee:

1) Appellants' preliminary brief(s), original and three copies, in either xerox or pageproof form, be filed and served not later than April 20, 1970;

2) Appellee's preliminary brief(s), original and three copies in either xerox or pageproof form, be filed and served not later than May 11, 1970;

3) Appellants' reply brief(s), if any, in either preliminary or final form, be filed and served not later than May 25, 1970;

4) The appendix to be filed and served not later than May 25, 1970;

5) Brief in final form to be hand-filed and hand-served not later than June 5, 1970; and

It is Further ORDERED that the Clerk of this Court list this case for argument on the merits during the week of June 22, 1970; and

It is Further Ordered that counsel for appellants and counsel for appellee advise the Clerk of this Court by letter, at the time of filing their respective preliminary brief, as to the total amount of argument time beyond thirty minutes, if any, which each side will request, and the number of counsel who will wish to argue for each side.

By the Court,

Seitz,

Circuit Judge.

Dated: April 10, 1970

Opinion of the United States Court of Appeals for the Third Circuit Filed on September 24, 1970.

ALDISERT, *Circuit Judge*.

Before us for review is an interlocutory order of the district court, duly certified for appeal under the provisions of 28 U. S. C. § 1292(b), denying appellants' motions to dismiss the action in its entirety or, alternatively, to dismiss certain individual, representative, and derivative claims.

Plaintiff-appellee, a shareholder of four mutual funds,[1] filed a three-count action against 65 mutual funds, 38 investment advisers, 37 directors alleged to be serving contemporaneously as fund directors or trustees and investment advisers, and the Investment Company Institute, a trade association. Appellee also sued a number of unnamed defendants as part of the three defendant classes: mutual funds, investment advisers, and "self-dealing" directors.

Charging violations of the Sherman Act, 15 U. S. C. §§ 1, 2, and the Clayton Act, 15 U. S. C. §§ 15, 26, Count I alleges that appellants have engaged in a combination and conspiracy "with horizontal and vertical forms and levels of agreement," to adopt and stabilize fees for management services and investment services, to limit competition, to refrain from providing internal fund management, and to otherwise monopolize the management market.

Count II invokes provisions of the Investment Company Act of 1940, 15 U. S. C. §§ 80a-1, *et seq.* It asserts that the investment advisers indulge in practices known as "give-ups," whereby they direct brokers to execute stock transactions for less than the commission paid to them, giving up the balance to non-executing brokers, and "reciprocals," whereby the advisers, in return for allocating por-

1. The Dreyfus Fund, Inc., Fidelity Trend Fund, Inc., Manhattan Fund, Inc., and The Putnam Growth Fund.

tions of the commissions to non-executing brokers, receive additional compensation in the form of free or discounted investment advice and management services.

Count III, brought under the Securities Exchange Act of 1934, 15 U. S. C. § 78n, the Investment Advisers Act of 1940, 15 U. S. C. §§ 80b-6, and the Investment Company Act, *supra*, charges appellants with misrepresentation in the preparation and issuance of proxy and other statements, including the failure to disclose, or the making of false disclosures with respect to, the alleged wrongdoing set forth in Counts I and II.

Appellee sought to maintain this action in several capacities: as a shareholder in his own right against the four funds in which he holds stock; as a class representative under FED. R. CIV. PRO. 23 of all similarly situated shareholders of 65 mutual funds; by virtue of his class representation of all similarly situated shareholders, derivatively on behalf of 65 mutual funds similarly situated; derivatively, under FED. R. CIV. PRO. 23.1, on behalf of the four funds of which he is a shareholder; and derivatively on behalf of the four mutual funds as a class action on behalf of the 61 other funds similarly situated.

The district court overruled the challenges to appellee's right to bring the action in any or all of the above capacities. This appeal followed, presenting for our consideration the following issues:

A. Does a shareholder of a mutual fund have a primary or personal cause of action to recover damages allegedly sustained by his corporation by reason of violations of the antitrust and security laws?

1. If so, may he sue as a class representative under Rule 23 on behalf of all similarly situated shareholders of other mutual funds?

2. And if he may sue on behalf of these shareholders, may he thereby acquire standing to sue secondarily or derivatively on behalf of the 65 mutual funds?

B. Does a shareholder of mutual funds who sues derivatively on behalf of those funds have standing to bring a class derivative action on behalf of other funds similarly situated?

C. Is a conflict of interest or disabling antagonism presented by appellee's suit on behalf of mutual funds against which he is simultaneously seeking an adjudication of liability?

A

A stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets. In this situation, it has been consistently held that the primary wrong is to the corporate body and, accordingly, that the shareholder, experiencing no direct harm, possesses no primary right to sue. *Ash v. International Business Machines*, 353 F. 2d 491 (3 Cir. 1965), *cert. denied*, 384 U. S. 927 (1966); *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3 Cir. 1910).

Conceding the basic vitality of this rule, appellee contends that the mutual fund is a novel corporate structure and that the unique relationship of the shareholder to the corporation confers upon the shareholder a primary right to redress harm to the fund. Since the redemptive value of a mutual fund share bears a direct relationship to the total net assets owned by the fund, the redemptive value is always directly affected by the net value of the total assets. Therefore, it is argued, when an injury to the

fund threatens the value of the assets, the shareholder possesses a primary right to sue.

The difficulty we perceive in this approach is that it fails properly to appreciate, or seeks to ignore, the fundamental tenet of corporation law which treats the corporate body as an entity—indeed, as a person—separate and distinct from those who own shares of its stock. It is this concept of separate identities which is the basis for distinguishing the rights, responsibilities, and immunities of shareholders from the rights and obligations of the corporation. It is this concept that reserves for the corporation the right to vindicate wrongs which harm the corporation, injuring the shareholders only in the sense that stock values are imperiled.

That the worth of a share of appellee's stock is directly proportionate to the value of a mutual fund's net assets is insufficient to destroy these separate identities, to alter the basic shareholder-corporation relationship, and to thereby confer upon appellee legal rights peculiar to the corporation. Nowhere in the cases do we find authority for the proposition that the ease and capacity of evaluating a shareholder's redemptive value of mutual fund shares can vest in him a pro-rata share of the corporation's primary right to sue. To accept this would be to convert an orthodox corporate structure to a general partnership or joint venture with each participant a principal and agent for the others.

Appellee further argues, however, that his right to sue is established by the antitrust character of this action. He insists that he need not be "directly" injured in order to maintain private treble damage claims, since "the word 'direct' does not appear in Section 4 of the Clayton Act," and because "[a]ll the law requires to state a private treble damage action claim are allegations adequate to show a violation of the antitrust acts and plaintiff has been dam-

aged thereby." *Knuth v. Erie-Crawford Dairy Coop. Ass'n.*, 395 F. 2d 420, 423 (3 Cir. 1968).

We have no quarrel with the view that such allegations are sufficient to state a claim. But we must not confuse requirements necessary to state a cause of action, which is not in issue here, with the prerequisites of standing. Our inquiry here concerns the issue of appellee's standing to sue in his own right when the injury alleged is the reduction in value of corporate shares. This court has considered this precise issue before and has rejected the position pressed by appellee. In *Ash, supra*, 353 F. 2d at 493-94, Chief Judge Hastie stated:

> [T]he complaint discloses that the hurtful effect of [the corporation's] conduct upon the value of his stock in competing corporations is the only injury he claims to have suffered.
>
> Such harm is not enough to make the plaintiff a "person . . . injured in his business or property" within the meaning of section 4 of the Clayton Act. The courts have consistently ruled that this language does not include the indirect harm that an individual may suffer as a stockholder through injury inflicted upon a corporation [Citations omitted].
>
> Indeed, were the rule otherwise the distinction between a stockholder's derivative claim and a claim exercised in his primary right would disappear, and the public policy based strictures on derivative suits could be avoided merely by asserting that economic harm to a corporation in itself constituted justiciable personal injury to each owner of stock in the corporation.

It being established that appellee's alleged injury is by definition "indirect," his attempt to prosecute this action

in his own right, as a shareholder, cannot succeed. Efforts to characterize the harm as "direct," or, arguments that "proximate harm" is sufficient or that appellee is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions," *South Carolina Council of Milk Products, Inc. v. Newton*, 360 F. 2d 414, 418 (4 Cir.), *cert. denied*, 385 U. S. 934 (1966), are simply unavailing in light of *Ash*. Indeed, appellee has cited no case in which a shareholder has achieved standing to remedy the type of harm portrayed here.

Because appellee, as a shareholder of the four funds, does not have standing to assert a personal action, it is evident that he may not serve as a class representative under Rule 23 on behalf of all similarly situated shareholders of the 65 funds. Before one may successfully institute a class action "[i]t is of course necessary generally that [he] be able to show injury to himself in order to entitle him to seek judicial relief." *Kansas City, Mo. v. Williams*, 205 F. 2d 47, 51 (8 Cir.), *cert. denied*, 346 U. S. 826 (1953). A plaintiff who is unable to secure standing for himself is certainly not in a position to "fairly insure the adequate representation" of those alleged to be similarly situated. *See* Wright, *Law of Federal Courts* 307-08. In short, a predicate to appellee's right to represent a class is his eligibility to sue in his own right. What he may not achieve himself, he may not accomplish as a representative of a class.

We must also reject the attempt to convert a shareholder class action, based on the theory of a personal primary right, to a class derivative action—through the shareholders—on behalf of the mutual funds. As noted, appellee is foreclosed from pursuing an action in his own right and, accordingly, may not create a class suit bottomed on such an action. Manifestly, what he may not create, he can-

not convert. The attempt, while resourceful, is congenitally incompatible.

B

We turn now to an examination of the contention that a shareholder of mutual funds who sues derivatively on behalf of those funds has standing to bring a class derivative action on behalf of other funds similarly situated.

Initially, we recognize that a shareholder of a corporation has standing to maintain a derivative action to enforce rights of that corporation. Rule 23.1. To be sure, "the most common example of [a derivative] action is a suit by minority stockholders . . . who claim that the corporation has been wronged." Wright, *supra*, at 317. Accordingly, putting aside the question of a possible conflict of interest, there is no doubt that appellee may litigate derivative actions in behalf of the four funds in which he holds shares. It is, of course, immaterial that these corporations have been named as defendants in the pleadings. Indeed, the shareholder's corporation must be made a separate party defendant, or the suit would be dismissed for failure to include an indispensable party, *Sylvia Martin Foundation, Inc. v. Swearingen*, 260 F. Supp. 231 (S. D. N. Y. 1966); *Philipbar v. Derby*, 85 F. 2d 27 (2 Cir. 1936); and the shareholder's corporation is entitled to answer the shareholder's complaint and defend its refusal to sue. *Otis & Co. v. Pennsylvania R. Co.*, 57 F. Supp. 680 (E. D. Pa. 1944). As Mr. Justice Frankfurter observed in his classic dissent in *Smith v. Sperling*, 354 U. S. 91, 99 (1957):

> The contrasting difference between a stockholder's suit for his corporation and a suit by him against it, is crucial. In the former, he has no claim of his own; he merely has a personal controversy with his corporation regarding the business wisdom or legal basis for the latter's assertion of a claim against third parties.

> Whatever money or property is to be recovered would go to the corporation, not a fraction of it to the stockholder. When such a suit is entertained, the stockholder is in effect allowed to conscript the corporation as a complainant on a claim that the corporation, in the exercise of what it asserts to be its uncoerced discretion, is unwilling to initiate. This is a wholly different situation from that which arises when the corporation is charged with invasion of the stockholder's independent right. Thus, for instance, if a corporation rearranges the relationship of different classes of security holders to the detriment of one class, a stockholder in the disadvantaged class may proceed against the corporation as a defendant to protect his own legal interest.

Appellee would have us further hold, however, that he is also entitled to bring a class derivative action on behalf of the 61 mutual funds in which he owns no shares but which are said to be similarly situated. It is his position that Rule 23.1 (stockholder derivative actions) and Rule 23 (class actions) should be read together to permit such a suit. We are of the opinion that this position is untenable.

Rule 23.1 specifically provides:

> In a derivative action brought by one or more shareholders . . . to enforce a right of a corporation . . . the complaint . . . shall allege (1) that the plaintiff was a shareholder . . . at the time of the transaction of which he complains or that his share . . . thereafter devolved on him by operation of law. . . .

It is uncontroverted that appellee is not now nor ever was a stockholder of any of the 61 funds he wishes to represent as a class representative in his derivative action. Thus, he

has not complied with this provision's unambiguous requirement—amounting to a legal principle—that one who does not own shares in a corporation is not qualified to bring a derivative action in his behalf.[2]

The timber of sound reason forms the conceptual underpinning of the rule requiring stock ownership in a corporation as the prerequisite for bringing a derivative action in its behalf. Only by virtue of the shareholder's interest, which has been described as "a proprietary interest in the corporate enterprise which is subject to injury through breaches of trust or duty on the part of the directors," *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 321 (1936), does equity permit him "to step into the corporation shoes and seek in its right the restitution he could not demand in his own."[3] Standing is justified only by this proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal

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2. *Lawrence v. Baltimore Paint & Chemical Corp.*, 298 F. Supp. 373 (D. Md. 1969). *See also* Wright, *supra*, at 318-19.

3. *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, 548 (1949). Mr. Justice Jackson further observed:

> He sues, not for himself alone, but as a representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to the plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interest he elects himself to represent. It is not without significance that this court has found it necessary long ago in the equity rules [old Equity Rule 94, 104 U. S. ix; Equity Rule 27, 226 U. S. 649, 656] and now in the Federal Rules of Civil Procedure [former Rule 23(b), now Rule 23.1] to impose procedural regulations of the class action not applicable to any other.

Id. at 549-50.

plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest. Without this relationship, there can be no standing, "no right in himself to prosecute this suit," *Hawes v. Oakland* (Hawes v. Contra Costa Water Co.), 104 U. S. 450, 462; *Venner v. Great Northern Railway*, 209 U. S. 24, 34 (1908).

Moreover, because it appears that Rule 23.1 was enacted for the purpose of treating stockholder derivative actions independently of Rule 23, we are particularly unwilling to permit appellee to combine the provisions of these two rules. As Professor Wright has pointed out:

> [I]n almost all derivative actions the stockholder is suing on behalf of a large class of other minority stockholders similarly situated. Because of this in the original rules these actions were treated in Rule 23(b), as a part of class actions generally. *In the 1966 revision it was decided to deal independently with derivative actions by stockholders in a separate Rule 23.1. Thus the general class action rule, Rule 23, no longer applies to stockholders' derivative suits.* By the same token, suits by stockholders that are not derivative, . . . are not subject to Rule 23.1.

Wright, *supra*, at 318-19 (emphasis supplied).[4]

Putting aside the enactment of Rule 23.1 as a separate rule, there is a serious question whether, in any case, the explicit limitation provisions have the capacity of expansion by the superimposition of the language of Rule 23

4. "'Derivative' actions on behalf of corporations do not fit in the groove of class actions. First, they do not necessarily involve a numerous class of shareholders. *Cf.* Galdi v. Jones, 141 F. 2d 984, 992 & n.3b (2 Cir. 1944). Second, they require special provisions regarding preconditions of suit such as demands on the corporation to bring the action." Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 HARV. L. REV. 356, 387, n.118.

permitting class actions when "there are questions of law or fact common to the class." Such questions cannot be common to the class when one who purports to be the class representative does not, in fact, own shares in a corporation whose interest he seeks to represent. The rights sought to be enforced cannot be considered "common" to those who do and those who do not own shares. "[T]he parties before the court must be members of the class they seek to represent. See *e.g. Hansberry v. Lee*, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); 3A MOORE, FEDERAL PRACTICE ¶ 23.04 at p. 3419." *Dolgow v. Anderson*, 43 F. R. D. 472, 491 (1968).

Accordingly, the attempt to bring a class action in behalf of all funds, by virtue of appellee's entitlement to bring derivative suits in behalf of each of the funds in which he holds shares, must fall.[5]

It is also necessary to consider appellee's alternative theory supporting his attempt to "commence a class action on behalf of all corporations." This concept seeks to achieve the same result as the class derivative action we have just discussed, but it is rationalized by a separate argument described in his brief as follows:

> . . . (1) a shareholder suing on behalf of a corporation may bring all suits which a corporation could commence but for the refusal of its officers and directors; (2) a corporation could commence a class action on behalf of all corporations similarly situated; and therefore (3) a shareholder, standing in the shoes of his corporation, may commence a class action on behalf of all corporations similarly situated.

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5. In the questions certified to us for appeal we do not reach the issue whether the individual derivative actions on behalf of the four funds in which appellee owns stock may be prosecuted as a class action or whether they must be pursued separately.

The fatal defect in this "champion of the industry" approach is that it seeks to equate a corporation's primary right of action with a shareholder's secondary right to bring a derivative action. To be sure, if the fund itself sought to bring a class action in behalf of other funds similarly situated, there would be no theoretical barrier prohibiting such a class action. But the fund is not the plaintiff in the case at bar, and the only right the individual derivative plaintiff possesses is a secondary one—a right which not only defines his standing to sue but also limits the extent of the possible recovery, i.e., the damage sustained by the corporation in which he is a shareholder. A secondary right is limited; it is co-extensive with plaintiff's need as a shareholder to protect an interest which allegedly has been impaired. And the very limitation that adheres conceptually in a derivative action is the bar which defeats appellee's attempt to qualify as the class representative for the other funds. A shareholder can only require a corporation to initiate a matter to protect the rights of a shareholder qua shareholder; he cannot force a corporation to bring a class action for the fundamental reason that whatever wrongs other corporations similarly situated have sustained are immaterial and irrelevant to a derivative plaintiff's limited and secondary cause of action. There may be injuries to the other corporations, but because appellee does not possess the stockholder relationship to them and the proprietary interest which accompanies this relationship, he may not qualify as their representative in a class action.

C

In view of our holding that appellee may not maintain a primary right of action against any of the mutual funds, Part A, *supra*, we are not convinced that a conflict of interest will be presented when we remand this case to the

district court for further proceedings on the derivative claims brought on behalf of the four funds in which appellee holds shares. Derivative claims, if successful, enforce a corporate cause of action, "[a]nd the relief which is granted is a judgment against a third party in favor of the corporation." *Price v. Gurney*, 324 U. S. 100, 105 (1945). That the corporation is named as a defendant does not, of course, change this result, for it is joined as a necessary party, only as a nominal or technical defendant, and any judgment obtained against the real defendant runs in its favor. *Meyer v. Fleming*, 327 U. S. 161, 167 (1946); *Knapp v. Bankers Security Corp.*, 230 F. 2d 717, 721 (3 Cir. 1956).

Moreover, we do not believe that appellee's attempt to bring primary suits against the funds is in and of itself sufficient to show interests antagonistic to them. Indeed, in the district court he relinquished any claim from monetary damages against the funds. In any event, we believe that sufficient safeguards exist under Rule 23(d) for the district court to take appropriate action during the course of the proceedings to guard against any conflicts of interests or disabling antagonisms which could possibly appear in the course of these proceedings. It has been said that a "full arsenal of adaptable methods is available to assure the fair and efficient conduct of the action."[6]

The judgment of the district court will be reversed except to the extent it permits appellee to maintain second-

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6. Rule 23(d), which sets forth various provisions for the making of appropriate orders in the course of a class action, restates the traditional powers of the court under prior law, although they were not spelled out in Rule 23 prior to the 1966 amendments. The catalogue of possible orders contained in Rule 23(d) is not exhaustive, as Rule 23(d)(5) leaves open the opportunity for orders "dealing with similar procedural matters." Further, the last sentence of Rule 23(d) provides that such orders may be combined with pretrial orders under Rule 16. Newberg, "Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)," 10 Boston College, Ind. & Com. L. R. 577 (1969).

ary or derivative actions in behalf of the four mutual funds in which he owns shares, i.e., The Dreyfus Fund Inc., Fidelity Trend Fund, Inc., Manhattan Fund, Inc., and The Putnam Growth Fund. The order of the district court which stayed all proceedings in that court will be vacated.

Judgment of the United States Court of Appeals for the Third Circuit Dated September 30, 1970.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed October 1, 1969, and December 18, 1969, be, and the same are hereby reversed, except to the extent said orders permit appellee to maintain secondary or derivative actions in behalf of the four mutual funds in which said appellee owns shares, that is The Dreyfus Fund, Inc., Fidelity Trend Fund, Inc., Manhattan Fund, Inc., and The Putnam Growth Fund, in accordance with the opinion of this Court.

Attest:
Thomas F. Quinn
Clerk

September 30, 1970

Order of the United States Court of Appeals for the Third Circuit Dated September 24, 1970.

It is Ordered that the order of the District Court for the District of New Jersey, entered on December 18, 1969, which order stayed all proceedings in the above-entitled cause pending further order of this Court, be and hereby is vacated, in accordance with the opinion of this Court.

Attest:
Thomas F. Quinn
Clerk

September 24, 1970

Order Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated October 30, 1970.

Present: Hastie, *Chief Judge*, Staut, Van Dusen, Wisdom, Aldisert and Gibbons, *Circuit Judges*.

The petition for rehearing filed by Joseph B. Kauffman, Appellee, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Ruggero Aldisert,
Judge.

Dated: October 30, 1970

Judge Freedman did not participate in the consideration of this case.

Amended Judgment of the United States Court of Appeals for the Third Circuit Dated November 12, 1970.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here Ordered and Adjudged by this Court that the interlocutory orders of said District Court, filed October 1, 1969, and December 18, 1969, denying motions to dismiss, for lack of standing, appellee's actions as a shareholder in his own right under Section 4 of the Clayton Act against the four funds in which he holds stock; as a class representative under Fed. Civ. Pro. 23 of all similarly situated shareholders of sixty-five mutual funds; by virtue of his class representation of all similarly situated shareholders, derivatively on behalf of sixty-five mutual funds similarly situated; derivatively, under Fed. R. Civ. Pro. 23.1, on behalf of the four funds of which he is a shareholder; and derivatively on behalf of the four mutual funds as a class action on behalf of the sixty-one other funds similarly situated, these interlocutory orders having been certified to this Court and leave to appeal having been granted by this Court, in accordance with the provisions of 28 U. S. C. Sec. 1292(b), said orders be, and the same are hereby reversed, except to the extent that said orders permit appellee to maintain secondary or derivative actions on behalf of the four mutual funds in which said appellee owns shares, that is The Dreyfus Fund, Inc., Fidelity Trend Fund, Inc., Manhattan Fund, Inc., and The Putnam Growth Fund; and the extent of the Court's review being so limited under the certification no decision is made on issues not so certified, including, inter alia, whether appellee may qualify as a class representative

under counts II and III, in accordance with the opinion of this Court.

Attest:
Thomas F. Quinn
Clerk

November 12, 1970

Certified as a true copy and issued in lieu of a formal mandate on November 18, 1970.

Test: Thomas F. Quinn

Clerk, United States Court of Appeals for the Third Circuit.

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SUPREME COURT, U. S.
FILED
FEB 22 1971
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

October Term, 1970

No. 1157

Joseph B. Kauffman, on Behalf of Himself and All Other Shareholders of Defendant Externally Managed Mutual Funds and All Other Externally Managed Mutual Funds Affiliated Therewith or Related Thereto and, Derivatively, on Behalf of Defendant Externally Managed Mutual Funds and All Other Externally Managed Mutual Funds Affiliated Therewith or Related Thereto,

Petitioner,

—v.—

The Dreyfus Fund, Inc., *et al.*,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1970

No. 1157

Joseph B. Kauffman, on Behalf of Himself and All Other Shareholders of Defendant Externally Managed Mutual Funds and All Other Externally Managed Mutual Funds Affiliated Therewith or Related Thereto and, Derivatively, on Behalf of Defendant Externally Managed Mutual Funds and All Other Externally Managed Mutual Funds Affiliated Therewith or Related Thereto,

Petitioner,

—v.—

The Dreyfus Fund, Inc., *et al.*,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Joint Brief in Opposition to Petition for Writ of Certiorari is submitted on behalf of those defendants in the District Court who participated as appellants in the interlocutory appeal to the United States Court of Appeals for the Third Circuit.

Opinions Below

The opinion of the District Court for the District of New Jersey is reported at 51 F.R.D. 18. The opinion of the United States Court of Appeals for the Third Circuit is reported at 434 F.2d 727.

Statutes and Rules Involved

The petition involves Section 4 of the Clayton Act, 15 U.S.C. § 15, and Rules 23 and 23.1 of the Federal Rules of Civil Procedure. Each of these provisions is set forth in Respondents' Appendix 1a-5a (hereinafter referred to as "Resp. App.").

Questions Presented

Despite the intricate array of multi-part questions presented by petitioner, the issues presented, which were decided in favor of respondents by the Court of Appeals, are as follows:

1. Does a shareholder of a mutual fund have a personal (in addition to a derivative) right of action to recover for his own account damages allegedly sustained by his corporation by reason of violations of the antitrust laws?

2. Does a shareholder of a mutual fund who sues derivatively on behalf of that fund have standing to bring a "class derivative" action on behalf of other mutual funds in which he does not own shares?

Statement of the Case

As previously noted, petitioner seeks a writ of certiorari addressed basically to the two questions stated above. Upon an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the Court of Appeals for the Third Circuit answered both of these questions in the negative.

In his complaint (Resp. App. 6a-43a), petitioner alleges that he is a shareholder of Manhattan Fund, Inc., Fi-

delity Trend Fund, Inc., The Putnam Growth Fund and The Dreyfus Fund, Inc. He seeks to utilize these shareholdings in such manner as to give him standing to mount, under both the antitrust and securities laws and on behalf of an indeterminate number of funds and their millions of shareholders, what the District Court described as "an attack nationwide upon the entire mutual fund industry." Petitioner's Appendix A8 (hereinafter referred to as "Pet. App.").

There are 141 defendants named in the complaint. Four are the mutual funds in which petitioner owns shares; four are the investment advisers of those funds; and four are individuals, each of whom is or was an affiliated director, within the meaning of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(3), of one of those four funds and its investment adviser.

The remaining 129 named defendants* have no relationship to petitioner or to his four funds. They consist of 61 mutual funds in which petitioner owns no shares; 34 investment advisers which serve one or more of those 61 funds; 33 individuals, each of whom serves as a director of one or more of the funds in which petitioner owns no shares; and the Investment Company Institute. However, the precise number and identity of defendants is unknown, since petitioner purports to sue each named defendant other than the Investment Company Institute as a representative of a class of other funds, advisers or directors

* The defendants were apparently selected without regard to their supposed "culpability", since plaintiff chose to name only funds with assets in excess of $100,000,000 and advisers and directors of such funds. Moody's, Bank & Finance Manual a53 (1968) and Wiesenberger, Investment Companies, Mutual Funds and Other Types 104-109 (1968 Ed.).

who are said to be "affiliated therewith or related thereto". See, *e.g.*, Compl. ¶ 5(a); Resp. App. 10a.

The complaint purports to set forth claims under three counts. Count I alleges that defendants, in violation of the antitrust laws, conspired to stabilize the management fees paid by the mutual funds to their investment advisers, to limit competition in the business of providing investment advisory services and to refrain from providing for internal investment management. Count II alleges that defendants, in violation of the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, *et seq.*, followed brokerage practices which permitted the advisers to utilize improperly for their own benefit portions of brokerage commissions paid by the mutual funds in connection with fund portfolio securities transactions. Count III alleges that defendants violated the disclosure provisions of various federal securities laws* by failing to disclose the unlawful conduct charged in the first two counts.

Under each of these counts, petitioner purports to assert:

(i) claims in his own primary right as a shareholder of the four mutual funds in which he owns shares;

(ii) by virtue of the purported individual claims:

(a) representative claims on behalf of the other shareholders of the four mutual funds in which he owns shares;

(b) representative claims on behalf of the shareholders of the 61 mutual funds in which he does not own shares; and

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* The Investment Advisers Act of 1940, 15 U.S.C. § 80b-6; the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, *et seq.*; and the Securities Exchange Act of 1934, 15 U.S.C. § 78n.

(c) derivative claims of the shareholders of the 61 mutual funds in which he owns no shares;

(iii) derivative claims on behalf of the four funds in which he owns shares; and

(iv) by virtue of the derivative claims described in (iii), "class derivative" claims on behalf of the 61 funds in which he owns no shares.

Respondents moved in the District Court for orders (Resp. App. 44a-45a):

(1) Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, dismissing the action on the grounds that, on the face of the Complaint, plaintiff does not fairly and adequately represent the interests of the funds or their shareholders;

(2) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing all claims asserted individually, or representatively on behalf of individual shareholders, on the ground that all of the claims asserted are necessarily derivative in nature;

(3) Pursuant to Rules 12(b)(6), 23 and 23.1 of the Federal Rules of Civil Procedure, dismissing each of Counts I, II and III to the extent they seek relief (a) on behalf of funds of which plaintiff is not a shareholder, and (b) on behalf of shareholders of funds of which plaintiff is not a shareholder, on the ground that a party may not maintain an action on behalf of a corporation, or shareholders of a corporation, unless he himself is a shareholder of that corporation; and

(4) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing Counts II and III for failure to state a claim upon which relief can be granted on the ground the conspiracy alleged therein does not

constitute a violation of the statutes under which relief is sought.*

The District Court denied these preliminary motions and, pursuant to 28 U.S.C. § 1292(b), certified the issues raised. Pet. App. A1-A9.

The Court of Appeals reversed the judgment of the District Court and, in its opinion, held that the complaint should be dismissed "except to the extent it permits appellee to maintain secondary or derivative actions in behalf of the four mutual funds in which he owns shares, *i.e.*, The Dreyfus Fund Inc., Fidelity Trend Fund, Inc., Manhattan Fund, Inc., and The Putnam Growth Fund". Pet. App. A25-A26.

In reaching its conclusion, the Court of Appeals, following "the fundamental tenet of corporation law which treats the corporate body as an entity—indeed, as a person—separate and distinct from those who own shares of its stock" (Pet. App. A16), held that the complaint did not state a primary or personal cause of action to recover damages on behalf of individual shareholders. Pet. App. A14-A18. While permitting the action to continue as a derivative action on behalf of the four funds of which petitioner is a shareholder (Pet. App. A19, A25-A26), the Court of Appeals rejected petitioner's attempt to pyramid

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* In addition to the above motions directed to the standing and capacity of petitioner, respondents filed a number of additional motions in the District Court, including motions challenging jurisdiction, venue and process as well as the legal sufficiency of the complaint. Resp. App. 44a-46a. The District Court directed that the standing and capacity motions be briefed, argued and decided, and that the remainder be held in abeyance for later resolution. Substantial threshold questions thus remain for decision by the District Court, whatever action may be taken by this Court with respect to the Petition.

his holdings in these four funds into standing to sue on behalf of an indeterminate number of funds of which he is not a shareholder (Pet. App. A18-A24), pointing out that "ownership in a corporation [is] . . . the prerequisite for bringing a derivative action in its behalf". Pet. App. A21.

The Court of Appeals also considered respondents' motion to dismiss the action in its entirety because of petitioner's conflicts of interest in seeking an adjudication of liability against the same mutual funds he purported to represent. In view of its holding that petitioner could not maintain a primary right of action against the defendant investment companies, the Court stated that it was not convinced that the case, as limited by its decision, would present any disabling conflicts of interest or disabling antagonisms and left it to the District Court to guard against them.

Reasons for Denying the Petition

The decision below permits petitioner to proceed in a derivative capacity in respect of his claims on behalf of each of the four funds of which he is a shareholder; it does not limit his right to seek relief on behalf of those funds. However, it does deny him the additional right to pursue those same claims in his individual capacity. It further denies him standing to sue on behalf of corporations of which he is not a shareholder.

These rulings do not present any issue worthy of review by this Court. The Court of Appeals followed (1) an unbroken line of decisions holding that corporate shareholders do not have personal or primary causes of action—

in addition to derivative or secondary rights—to recover for damages allegedly inflicted upon their corporations in violation of the antitrust laws, and (2) the clear requirements of Rule 23.1—"amounting to a legal principle" (Pet. App. A21)—that one who does not own shares in a corporation is not qualified to bring a derivative action on its behalf.

Petitioner's contentions that the decision below is in conflict with the decisions of other Circuits and even of this Court, and that it presents important questions regarding the enforcement of antitrust policy, are demonstrably without merit.

A. The Court of Appeals' Holding That Only Derivative Claims Can Be Maintained Does Not Conflict With Any Decisions of This Court or of Any Circuit and Presents No Important Question Regarding Private Enforcement of the Antitrust Laws.

The complaint is based on alleged injuries to the defendant mutual funds themselves, *i.e.*, corporate harm resulting from payment by the funds of allegedly excessive management fees and brokerage commissions. Consequently, the Court below held that the allegations gave rise only to claims which may be asserted by those funds directly or derivatively by their shareholders acting on their behalf.

Petitioner, however, contends that the Court of Appeals erred in ruling that Count I (the antitrust claim) did not also state *personal* causes of action because of the allegedly unique structure of mutual funds and the public policy of the antitrust laws.

Petitioner made these same contentions before the Court below. Nonetheless, the Court of Appeals ruled in accord-

ance with settled principles of corporate and antitrust law that to permit a shareholder to recover "indirect" personal damages in his own right where "direct" and primary harm, in violation of the antitrust laws, has been done to the corporate enterprise, would be to abolish the distinction between a shareholder's derivative right and a claim asserted in the shareholder's own primary right. In so ruling, the Court of Appeals reaffirmed its holding in the leading case of *Ash* v. *International Business Machines, Inc.*, 353 F.2d 491, 494 (3d Cir. 1965) (Hastie, J.), *cert. denied*, 384 U.S. 927, that:

> "... [W]ere the rule otherwise, the distinction between a stockholder's derivative claim and a claim exercised in his primary right would disappear, and the public policy based strictures on derivative suits could be avoided merely by asserting that economic harm to a corporation in itself constituted justiciable personal injury to each owner of stock in the corporation."

As in *Ash* and its predecessor *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910), whenever the question has been considered, it has been recognized that a stockholder has no cause of action in his own right for an antitrust injury inflicted upon his corporation.* The cited deci-

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* See, *e.g.*, *Bookout* v. *Rehine Chain Theaters, Inc.*, 253 F.2d 292, 294 (2d Cir. 1958) ("[I]t is well established that ... [a stockholder] has no separate claim under the Anti-Trust Acts. ...") ; *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F.2d 678, 679 (2d Cir. 1955) ("Shareholders ... of corporations ... have been held not to have standing to sue for treble damages.") ; *Peter* v. *Western Newspaper Union*, 200 F.2d 867, 872 (5th Cir. 1953) ("[I]t is well settled that a stockholder in a corporation as such is not injured in his business or property within the meaning of ... [Section 4 of the Clayton Act] merely because the unlawful combination or conspiracy has caused injury to the

sions under Section 4 of the Clayton Act are in accord with the general principles set forth by this Court in *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U.S. 479, 487-88:

> "The injury feared is the indirect harm which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order."

Petitioner's effort to create the appearance of a conflict between the Second and Third Circuits, on the one hand, and the Fourth, Eighth and Ninth Circuits, on the other, relating to the proper standard to be applied in determining standing under Section 4 of the Clayton Act—that is, whether the proper test is the directness or indirectness of the alleged injury or whether the injured party is within the so-called "target area"—is unavailing in the light of these decisions.

In support of his contention, petitioner places heavy reliance on the decision of the Ninth Circuit in *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970). See Petition pp. 8-9, 11. This reliance is misplaced,

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business or property of the corporation as a result of which the value of its stock has been reduced."); *Congress Building Corp.* v. *Loew's, Inc.*, 246 F.2d 587, 591 (7th Cir. 1957) ("To permit individual stockholder recovery would run counter to the traditional treatment of corporate injury that the corporation is the proper party to redress corporate wrongs."); *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 10 (9th Cir. 1963), *cert. denied*, 385 U.S. 976 ("Walker Distributing Company, Inc. was the distributor, and there are no allegations showing that the appealing individuals were in any way affected by Lucky's conduct save in their capacity as Walker Distributing's stockholders. This is not enough.").

since *Mulvey* did not purport to reverse the Ninth Circuit's earlier express holding in *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 323 F.2d 1, 10 (9th Cir. 1963), *cert. denied*, 385 U.S. 976, that a shareholder does not have a personal right of action under the antitrust laws. In *Mulvey*, the relationship between corporation and shareholder was not even involved and, as recently as 1969, the Ninth Circuit reaffirmed the general principle that individual shareholders do not have primary causes of action for damages inflicted upon their corporations. *Erlich* v. *Glasner*, 418 F.2d 226, 228 (9th Cir. 1969).

The Fourth Circuit is in accord. That Circuit, in *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (4th Cir. 1966), *cert. denied*, 385 U.S. 934, a decision relied upon by petitioner as establishing the purported conflict (Petition pp. 10-11), specifically reaffirmed the continued vitality of the rule that a corporate shareholder may not sue individually to recover for antitrust injuries inflicted upon his corporation, pointing out that in such cases "the injury to the plaintiff [is] derivative and the corporate entity intervene[s] to suffer the damage immediately and entirely". 360 F.2d at 417. Similarly, the Eighth Circuit has also followed the general principle that individual shareholders do not have primary causes of action for damages inflicted upon a corporation. *Brictson* v. *Woodrough*, 164 F.2d 107, 109 (8th Cir. 1947), *cert. denied*, 334 U.S. 849.

Likewise without substance is petitioner's contention that the Petition raises an important issue regarding the private enforcement of antitrust policy. Petition p. 8. The premise of this argument appears to be that, unless petitioner is held to have such a personal or primary right,

wrongs indirectly sustained by him and other shareholders would go unremedied and the effectiveness of the private action as a means of enforcing the antitrust policy of the United States would be diluted, if not destroyed. Petition p. 12. Nowhere, however, has petitioner suggested any reason why a corporate recovery would not provide complete relief from the wrongs of which he complains.

Indeed, the Court below was careful to point out that its result *would not* leave petitioner without remedy:

> "[W]e recognize that a shareholder of a corporation has standing to maintain a derivative action to enforce rights in that corporation. Rule 23.1. . . . Accordingly, putting aside the question of a possible conflict of interest, there is no doubt that appellee may litigate derivative actions in behalf of the four funds in which he holds shares." Pet. App. A19.

Thus, cases such as *Arnold Tours, Inc.* v. *Camp*, 397 U.S. 315; *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159; *Perkins* v. *Standard Oil Co.*, 395 U.S. 642; and *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3239 (U.S. Nov. 20, 1970) No. 969, are inapposite because they involved plaintiffs who would have been without a remedy of any kind unless they were accorded standing to sue. Here, the only question is whether, on the one hand, the proper party-plaintiff is the corporation (or one suing derivatively on its behalf), or, on the other hand, its shareholders suing in their primary right on their own behalf. This question has uniformly been answered by holding that it is the corporation (or a shareholder suing derivatively on its behalf) which is the proper party-plaintiff and that it is the corporation which

properly would be the recipient of any recovery. The instant case is not an appropriate vehicle for passing on the question of standing under the Clayton Act because petitioner, unlike other plaintiffs asserting "indirect injury", is protected by the corporation's recovery in the derivative action.

The cases cited by petitioner simply do not support his claim that a mutual fund shareholder "has standing to sue *in his own right* as well as derivatively for *any* violations of law involving mutual funds" and that the same policy should apply under the antitrust laws. Petition pp. 1-2. Moreover, petitioner's assertion that he has standing under the Investment Company Act is directly contrary to the Court of Appeals' holding that the complaint does not state individual claims under the federal securities laws. Pet. App. A14, A18, A24, A26. Since petitioner has not sought this Court's review of that determination, the Court of Appeals' decision is final and binding.

There is, moreover, no reason of policy why mutual fund shareholders—as opposed to corporate shareholders generally—should be singled out for preferential treatment under the antitrust laws. If shareholders are allowed to recover corporate damages for their own account, the antitrust injury to the enterprise as a whole will go unremedied, for, by definition, permitting the shareholders a recovery in their own right will mean that the corporate treasury will never receive compensation.

Petitioner cannot rely on the redemption feature of mutual fund shares to avoid the "fundamental tenet of corporation law which treats the corporate body as an entity —indeed, as a person,—separate and distinct from those

who own shares of its stock". Pet. App. A16. As the Court of Appeals said:

> "That the worth of a share of appellee's stock is directly proportionate to the value of a mutual fund's net assets is insufficient to destroy these separate identities, to alter the basic shareholder-corporation relationship, and to thereby confer upon appellee legal rights peculiar to the corporation. Nowhere in the cases do we find authority for the proposition that the ease and capacity of evaluating a shareholder's redemptive value of mutual fund shares can vest in him a pro-rata share of the corporation's primary right to sue. To accept this would be to convert an orthodox corporate structure to a general partnership or joint venture with each participant a principal and agent for the others." Pet. App. A16.

See also *Herman* v. *Steadman*, 50 F.R.D. 488 (S.D.N.Y. 1970); *Weiner* v. *Winters*, 50 F.R.D. 306 (S.D.N.Y. 1970).

Thus, petitioner's bootstrap denomination of the shareholders of a mutual fund as "customer-shareholders" proves nothing. It does not change their legal status as shareholders. Even sole shareholders have only derivative claims for wrongs to their wholly-owned corporations. *Mullins* v. *First Nat'l Exchange Bank*, 275 F. Supp. 712, 721 (W.D. Va. 1967); *Liken* v. *Shaffer*, 64 F. Supp. 432, 438-439 (N.D. Iowa 1946).

The typical mutual fund is a corporation organized and existing under state law. It has a board of directors elected by thousands of public shareholders. It owns its own assets, purchases and sells securities as a corporation, enters into contracts as a corporation, holds itself out to the public as a corporation, and in all ways conducts its business as a corporation. Its stockholders are insulated from per-

sonal liability for acts or debts of the corporation; they cannot personally sue to enforce corporate debts or to recover on corporate causes of action.

The shareholder of a mutual fund, like the shareholder of any other corporation, has an undivided interest in the assets of his corporation and no personal rights in particular corporate assets. Accordingly, if there is any recovery in this case, it must go to the funds and not to individual shareholders.*

B. The Court of Appeals' Holding That a Plaintiff Cannot Sue Derivatively on Behalf of Corporations in Which He Does Not Own Stock Presents No Issue Worthy of Review by This Court.

Rule 23.1 of the Federal Rules of Civil Procedure lays down the rule that a derivative suit can be maintained only by a shareholder:

> "In a derivative action brought by one or more *shareholders* or *members* to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a *shareholder* or *member* at the time of the transaction of

* The proposition that petitioner is, in effect, asking this Court to accept was flatly rejected by the SEC after an exhaustive and painstaking study. The SEC stated:

> "The Commission believes that it would be most unwise to accept the foregoing analysis for regulatory purposes. It is clearly rejected in the Act. The courts also have held that mutual fund shareholders are not merely individual advisory clients, and that the funds have rights that can be enforced by their shareholders just as other types of corporations have rights that can be enforced by their shareholders (citing cases)." SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 76 (1966).

> which he complains or that his share or membership thereafter devolved on him by operation of law. . . ." (Emphasis added.)

The "shareholder" limitation in derivative actions has been a fixed and important principle of federal practice since *Hawes* v. *Oakland*, 104 U.S. 450;* and no exception is recognized.

In the Courts below petitioner sought to nullify the clear language of Rule 23.1 through the creation of a "class derivative" form of action, which, he contended, clothes a non-shareholder with standing to assert derivative claims on behalf of corporations in which he has no interest and in which he owns no shares. He advanced two theories to support his contention. On the one hand, petitioner argued that since "his" funds could allegedly bring a class action on behalf of all mutual funds pursuant to Rule 23, he, as a shareholder suing on their behalf, can bring a class action on behalf of all such mutual funds. Alternatively, he argued that as the self-declared representative of the shareholders of all 65 funds, he is entitled to assert the derivative rights of all shareholders on behalf of all 65 funds. Petitioner has abandoned the latter claim which, along with the former claim, was rejected in the Court below. Pet. App. A18.

In following the express requirement of Rule 23.1 that only a shareholder of a corporation may bring a derivative action on its behalf, and in rejecting petitioner's attempt to sue derivatively on behalf of corporations of which he

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* The principle of *Hawes* v. *Oakland* was promptly adopted as Equity Rule 94, 104 U.S. ix, and has been continued in effect ever since, with only minor revisions, as Equity Rule 27 in 1913, 226 U.S. 629, 656, the original Rule 23(b), Fed. R. Civ. P., and now as Rule 23.1, Fed. R. Civ. P.

is not a shareholder, the Court of Appeals was clearly correct. As the Court pointed out in its well-reasoned decision:

> "The timber of sound reason forms the conceptual underpinning of the rule requiring stock ownership in a corporation as the prerequisite for bringing a derivative action in its behalf. Only by virtue of the shareholder's interest, which has been described as 'a proprietary interest in the corporate enterprise which is subject to injury through breaches of trust or duty on the part of the directors,' *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 321 (1936), does equity permit him 'to step into the corporation shoes and seek in its right the restitution he could not demand in his own.' Standing is justified only by this proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest. Without this relationship, there can be no standing, 'no right in himself to prosecute this suit,' *Hawes* v. *Oakland* (Hawes v. Contra Costa Water Co.), 104 U.S. 450, 462; *Venner* v. *Great Northern Railway*, 209 U.S. 24, 34 (1908)." Pet. App. A21.

The Court of Appeals also concluded:

> "[T]he fund is not the plaintiff in the case at bar, and the only right the individual derivative plaintiff possesses is a secondary one—a right which not only defines his standing to sue but also limits the extent of the possible recovery, *i.e.*, the damage sustained by the corporation in which he is a shareholder." * Pet. App. A24.

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* The clear implication of this conclusion is that petitioner cannot be deemed to be a member of the class of the 65 mutual funds as required by Rule 23(a):

> "One or more *members* of a class may sue or be sued as representative parties on behalf of all . . . ." (Emphasis added.) See also, *Hansberry* v. *Lee*, 311 U.S. 32.

No authority has been found to support the claim that a shareholder-plaintiff may use Rule 23 as a device to give him standing to bring suit on behalf of corporations in which he does not own shares and thereby override the carefully drawn provisions of Rule 23.1. Indeed, every such effort to circumvent Rule 23.1 in this manner has been flatly rejected. *Herman* v. *Steadman*, 50 F.R.D. 488 (S.D. N.Y. 1970); *Weiner* v. *Winters*, 50 F.R.D. 306 (S.D.N.Y. 1970); *Verrey* v. *Ellsworth*, 303 F. Supp. 497, 499-501 (S.D.N.Y. 1969). The courts have uniformly held that only a shareholder of a particular investment company has standing to sue on its behalf. See *SEC* v. *General Time Corp.*, 407 F.2d 65, 71 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026; *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 792-94 (8th Cir. 1967).*

The requirements for maintaining a derivative action** were split off from the old class action rule and separately stated for the precise purpose of emphasizing the distinctive nature of the derivative suit and the limitation on the class of persons entitled to maintain it.

> "A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule." Notes of Advisory Commit-

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* The recent amendments to Section 36 of the Investment Company Act of 1940 reflect the Congressional intention that only shareholders of a fund may bring an action on behalf of that fund. See Investment Company Amendments Act of 1970, §20, 84 Stat. 1413, 1428-30 (1970).

** Prior demand by the shareholder upon directors or shareholders and verification of the complaint are both important requirements of the Rule. Neither requirement can be met by petitioner who purports to sue on behalf of 61 arbitrarily selected mutual funds in which he owns no shares.

tee on Rules, Fed. R. Civ. P. 23.1, 28 U.S.C.A. at p. 136 (Supp. 1970).

See also 3B Moore, Federal Practice ¶ 23.1.16 (2d ed. 1969); Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 Harv. L. Rev. 356, 387 n. 118 (1967).

In this context, the Court below, quoting Professor Wright, pointed out:

> *"In the 1966 revision it was decided to deal independently with derivative actions by stockholders in a separate Rule 23.1. Thus the general class action rule, Rule 23, no longer applies to stockholders' derivative suits."* Pet. App. A22 quoting Wright, Law of Federal Courts 318-319. (Emphasis in Court of Appeals' opinion.)

None of the cases cited by petitioner at pages 19 and 20 of his Petition (*Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir. 1970), *cert. denied*, 398 U.S. 950; *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977; *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969)) was a derivative suit, and Rule 23.1 was in no way involved.

Petitioner's reliance on this Court's decision in *Ross* v. *Bernhard*, 396 U.S. 531, is likewise misplaced. That case stands only for the proposition that the Seventh Amendment "right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury." 396 U.S. at 532-33. Nowhere was it suggested that the limited right conferred on a shareholder by Rule 23.1 to bring a

derivative suit on behalf of his corporation stripped other corporations of the protective provisions embodied in Rule 23.1.

The provisions of Rule 23.1 were not intended to be circumvented, as petitioner attempts here, by those who would bring an action

> "not in the interest of the corporation or of its stockholders, but in order to obtain money for particular individuals who had no interest in the corporation or in its stockholders." *Beneficial Industrial Loan Corp.* v. *Smith*, 170 F.2d 44, 51 (3d Cir. 1948), *aff'd sub nom. Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

Finally, respondents invite this Court's attention to one additional consideration. Were petitioner allowed to sue on behalf of corporations of which he is not a shareholder, he would re-establish himself in the position of mutually irreconcilable and antagonistic loyalties established by the complaint as drawn.

In the Courts below, respondents urged that petitioner's complaint presented a host of disabling conflicts of interest by reason of petitioner's suit on behalf of the same mutual funds against which he was simultaneously seeking an adjudication of liability. The Court of Appeals concluded that, in view of its holding that petitioner may not maintain a primary right of action against any of defendant mutual funds, "we are not convinced that a conflict of interest will be presented when we remand this case to the district court for further proceedings on the derivative claims brought on behalf of the four funds in which appellee holds shares". Pet. App. A24-A25.

Rules 23 and 23.1 of the Federal Rules of Civil Procedure expressly provide, in a prohibitive and cautionary manner,

that an action in which a plaintiff seeks to represent other parties may not be maintained unless the party seeking to enforce the rights of the class or of the corporation will "fairly and adequately" protect the interests of the class (Rule 23(a)(4)) or will "fairly and adequately" represent the interests of the shareholders or members of the corporation or association (Rule 23.1). This Court has long recognized that in order for a party fairly and adequately to represent a class, his interests must be wholly compatible with and not antagonistic to those whom he would represent. *Hansberry* v. *Lee*, 311 U.S. 32.

The conflicts of interest apparent on the face of the complaint violate all of these principles. The complaint clearly exposes each fund to liability not only to its own shareholders, but also to each of the other funds and to the shareholders therein. By casting himself as the representative of these same funds, petitioner has arrayed them in a complex of simultaneously offensive and defensive postures in complete disregard of the basic duty of loyalty which he owes to each.

It is petitioner himself who has created these irreconcilable conflicts through a perversion of Rules 23 and 23.1 in order to maximize the number of parties involved in this action. A derivative as well as a class action requires a representative party who is free of conflict of interest, and the expediency of a derivative or of a class action cannot be used as an excuse to compromise the very principle of undivided loyalty upon which these actions depend. *Guttman* v. *Braemer*, CCH Fed. Sec. L. Rep. ¶ 92,889, at 90,315-16 (S.D.N.Y. December 15, 1970). It is this untenable position that petitioner is seeking to re-establish through his Petition.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition should be denied.

Respectfully submitted,

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Certificate of Service

I, JAMES C. PITNEY, a member of the Bar of the Supreme Court of the United States, hereby certify that on this 19th day of February, 1971, three copies of Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari were served on behalf of all Respondents in this proceeding, by first class mail, postage prepaid, on each of the following attorneys:

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Van Strum & Towne, Inc.,
Lehman Brothers and
Allan B. Hunter.

RESPONDENTS' APPENDIX

Statutes and Rules Involved

Section 4 of the Clayton Act, 15 U.S.C. § 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Rule 23. Class Actions.

(a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular

issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Statutes and Rules Involved

Rule 23.1. Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Ex.

Complaint

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 134368

JURY TRIAL DEMANDED

JOSEPH B. KAUFFMAN
27 South Oakland Avenue
Ventnor City, New Jersey

On behalf of himself and all other shareholders of defendant externally managed mutual funds and all other externally managed mutual funds affiliated therewith or related thereto and, derivatively, on behalf of defendant externally managed mutual funds and all other externally managed mutual funds affiliated therewith or related thereto

Plaintiff,

v.

THE DREYFUS FUND, INC., INVESTORS MUTUAL, INC., INVESTORS STOCK FUND, INC., INVESTORS VARIABLE PAYMENT FUND, INC., WELLINGTON FUND, INC., WINDSOR FUND, INC., AFFILIATED FUND, INC., UNITED FUNDS, INC., UNITED ACCUMULATIVE FUND, UNITED INCOME FUND, UNITED SCIENCE FUND, FUNDAMENTAL INVESTORS, INC., DIVERSIFIED GROWTH STOCK FUND, INC., DIVERSIFIED INVESTMENT FUND, INC., FIDELITY TREND FUND, INC., FIDELITY FUND, INC., PURITAN FUND, INC., FIDELITY CAPITAL FUND, INC., DOW THEORY INVESTMENT FUND, INC., THE INVESTMENT COMPANY OF AMERICA, AMERICAN MUTUAL FUND, INC., WASHINGTON MUTUAL

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INVESTMENT COMPANY INSTITUTE,

Defendants.

COMPLAINT

Count One

1. This action is instituted under Section 16 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 737 (15 USC § 26) for equitable relief and under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 USC § 15) to recover treble damages and the costs of suit, including reasonable attorneys' fees, against the defendants for the injuries sustained by plaintiff and members of the class represented by him and, derivatively, by defendant externally managed mutual funds and members of the class represented by them by reason of defendants' violations as hereinafter alleged of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 USC §§ 1 and 2), commonly known as the Sherman Act.

A. *Plaintiff and Plaintiff Classes*

2. Plaintiff Joseph B. Kauffmann ("Kauffmann") is an individual with his residence at 27 South Oakland Avenue, Ventnor City, New Jersey. Kauffmann has been a shareholder of the following externally managed, open-end investment companies ("externally managed mutual funds"): defendant Fidelity Trend Fund, Inc. since November 22, 1965; defendant The Putnam Growth Fund since November 22, 1965; defendant The Dreyfus Fund Inc. since November 24, 1965; and defendant Manhattan Fund, Inc. since February 24, 1966. At present, Kauffmann owns 413 shares of Fidelity Trend Fund, Inc. common stock, 476 shares of

Complaint

The Putnam Growth Fund common stock, 626 shares of The Dreyfus Fund Inc. common stock and 51 shares of Manhattan Fund, Inc., common stock.

3. Plaintiff is representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure and brings this action on behalf of himself and the entire class.

4. Plaintiff also brings this action derivatively on behalf of defendant externally managed mutual funds and, in his capacity as representative, derivatively on behalf of all other externally managed mutual funds affiliated therewith or related thereto.

5. (a) The representative class consists of all shareholders of the common stock of defendant externally managed mutual funds and all other shareholders of externally managed mutual funds affiliated therewith or related thereto.

(b) The derivative class consists of defendant externally managed mutual funds and all other externally managed mutual funds affiliated therewith or related thereto.

6. Each class is so numerous and geographically so widely distributed that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the representative and derivative plaintiff are typical of the claims of each class and plaintiff will fairly and adequately protect the interests of each class.

7. The prosecution of separate actions by individual members of each class would create the risk of:

(a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of each class which would establish incompatible standards of conduct for the parties opposing each class; and

(b) adjudications with respect to individual members of each class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

8. The questions of law and fact common to the members of each class predominate over any questions affecting only individual members and each class action is superior to other available methods for the fair and efficient adjudication of the controversy.

9. The derivative action is not a collusive one to confer jurisdiction on a Court of the United States which it would not have otherwise.

10. Demand by plaintiff that defendant externally managed mutual funds or any other externally managed mutual funds affiliated therewith or related thereto bring this action would have been futile and, therefore, was not made.

B. *Defendants and Defendant Classes*

11. (a) The following defendants are externally managed mutual funds (corporations unless otherwise in-

dicated), each of which is sued individually, as a co-conspirator, as a member of defendant Investment Company Institute, as an externally managed mutual fund and as a representative on behalf of all other externally managed mutual funds affiliated therewith or related thereto with their principal places of business, as indicated:

THE DREYFUS FUND, INC.
2 Broadway
New York, New York

INVESTORS MUTUAL, INC.
INVESTORS STOCK FUND, INC.
INVESTORS VARIABLE PAYMENT FUND, INC.
1000 Roanoke Building
Minneapolis, Minnesota

WELLINGTON FUND, INC.
WINDSOR FUND, INC.
3001 Philadelphia Pike
Claymont, Delaware

AFFILIATED FUND, INC.
63 Wall St.
New York, New York

UNITED FUNDS, INC., a corporation also d/b/a
UNITED ACCUMULATED FUND
UNITED INCOME FUND
UNITED SCIENCE FUND
20 West 9th St.
Kansas City, Missouri

Fundamental Investors, Inc.
Diversified Growth Stock Fund, Inc.
Diversified Investment Fund, Inc.
Westminster At Parker
Elizabeth, New Jersey

Fidelity Trend Fund, Inc.
Fidelity Fund, Inc.
Puritan Fund, Inc.
Fidelity Capital Fund, Inc.
Dow Theory Investment Fund, Inc.
35 Congress St.
Boston, Massachusetts

The Investment Company of America
American Mutual Fund, Inc.
900 Wilshire Blvd.
Los Angeles, California

Washington Mutual Investors Fund, Inc.
Southern Building
Washington, D. C.

Hamilton Funds, Inc.
777 Grant St.
Denver, Colorado

Technology Fund, Inc.
120 South LaSalle St.
Chicago, Illinois

Chemical Fund, Inc.
65 Broadway
New York, New York

The George Putnam Fund of Boston, a trust
The Putnam Growth Fund, a trust
Putnam Investors Fund, Inc.
265 Franklin St.
Boston, Massachusetts

Manhattan Fund, Inc.
245 Park Ave.
New York, New York

Dividend Shares, Inc.
Bullock Fund, Ltd.
One Wall St.
New York, New York

State Street Investment Corp.
Federal Street Fund, Inc.
225 Franklin St.
Boston, Massachusetts

Boston Fund, Inc.
111 Devonshire St.
Boston, Massachusetts

Financial Industrial Fund, Inc.
950 Broadway
Denver, Colorado

National Securities Series, a trust also d/b/a
National Securities Stock Series
National Securities Growth Series
120 Broadway
New York, New York

KEYSTONE CUSTODIAN FUNDS, INC., a corporation
also d/b/a
KEYSTONE LOWER-PRICED COMMON STOCK FUND (S-4), a trust
KEYSTONE GROWTH FUND (K-2), a trust
KEYSTONE GROWTH COMMON STOCK FUND (S-3), a trust
KEYSTONE INCOME COMMON STOCK FUND (S-2), a trust
KEYSTONE INCOME FUND (K-1), a trust
50 Congress St.
Boston, Massachusetts

AXE-HOUGHTON FUND B, INC.
400 Benedict Ave.
Tarrytown, New York

GROUP SECURITIES, INC.
One Exchange Place
Jersey City, New Jersey

EATON & HOWARD STOCK FUND, a trust
EATON & HOWARD BALANCED FUND, a trust
24 Federal St.
Boston, Massachusetts

THE ONE WILLIAM STREET FUND, INC.
One William St.
New York, New York

T. ROWE PRICE GROWTH STOCK FUND, INC.
ROWE PRICE NEW HORIZONS FUND, INC.
One Charles Center
Baltimore, Maryland

Channing Shares, Inc., a corporation also d/b/a
Channing Growth Fund
Channing Balanced Fund
85 Broad St.
New York, New York

The Colonial Fund, Inc.
75 Federal St.
Boston, Massachusetts

Selected American Shares, Inc.
135 South LaSalle St.
Chicago, Illinois

Commonwealth Investment Co.
650 California St.
San Francisco, California

Massachusetts Fund, a trust
70 Federal St.
Boston, Massachusetts

Loomis-Sayles Mutual Fund, Inc.
225 Franklin St.
Boston, Massachusetts

Scudder, Stevens & Clark Common Stock Fund, Inc.
Scudder, Stevens & Clark Balanced Fund, Inc.
10 Post Office Sq.
Boston, Massachusetts

Stein Roe & Farnham Balanced Fund, Inc.
135 South LaSalle St.
Chicago, Illinois

THE VALUE LINE SPECIAL SITUATIONS FUND, INC.
5 East 44th St.
New York, New York

PIONEER FUND, INC.
60 State St.
Boston, Massachusetts

ENERGY FUND, INC.
55 Broad St.
New York, New York

(b) The following defendants are investment advisers of defendant externally managed mutual funds ("investment advisers") (corporations unless otherwise indicated), each of which is sued individually, as a co-conspirator, as an investment adviser and as a representative on behalf of all other investment advisers affiliated therewith or related thereto, with their principal places of business, as indicated:

THE DREYFUS CORP.
2 Broadway
New York, New York

INVESTORS DIVERSIFIED SERVICES, INC.
Investors Building
Minneapolis, Minnesota

WELLINGTON MANAGEMENT CO.
1630 Locust St.
Philadelphia, Pennsylvania

Loun, Assett & Co., a partnership
63 Wall St.
New York, New York

Waddell & Reed, Inc.
20 West 9th St.
Kansas City, Missouri

Anchor Corp.
Westminster At Parker
Elizabeth, New Jersey

Fidelity Management & Research Co.
35 Congress St.
Boston, Massachusetts

Capital Research & Management Co.
900 Wilshire Blvd.
Los Angeles, California

Johnston, Lemon & Co., a partnership
900 Southern Building
Washington, D. C.

Hamilton Management Corp.
777 Grant St.
Denver, Colorado

Supervised Investors Services, Inc.
120 South LaSalle St.
Chicago, Illinois

F. Eberstadt & Co., a partnership
65 Broadway
New York, New York

PUTNAM MANAGEMENT CO., INC.
265 Franklin St.
Boston, Massachusetts

TRAI MANAGEMENT & RESEARCH CORP.
245 Park Avenue
New York, New York

CALVIN BULLOCK, LTD.
One Wall St.
New York, New York

STATE STREET RESEARCH & MANAGEMENT CO., a partnership
225 Franklin St.
Boston, Massachusetts

BOSTON MANAGEMENT & RESEARCH CO., INC.
111 Devonshire St.
Boston, Massachusetts

VANCE, SANDERS & CO., INC.
111 Devonshire St.
Boston, Massachusetts

FINANCIAL PROGRAMS, INC.
950 Broadway
Denver, Colorado

NATIONAL SECURITIES & RESEARCH CORP.
120 Broadway
New York, New York

KEYSTONE CUSTODIAN FUNDS, INC.
50 Congress St.
Boston, Massachusetts

E. W. Axe & Co., Inc.
400 Benedict Ave.
Tarrytown, New York

Distributors Group, Inc.
60 Pine St.
New York, New York

Eaton & Howard, Inc.
24 Federal St.
Boston, Massachusetts

Lehman Brothers, a partnership
One William St.
New York, New York

T. Rowe Price & Associates, Inc.
Rowe Price Management Co., Inc.
One Charles Center
Baltimore, Maryland

Van Strum & Towne, Inc.
85 Broad St.
New York, New York

Colonial Management Associates, Inc.
75 Federal St.
Boston, Massachusetts

Security Supervisors, a partnership
135 South LaSalle St.
Chicago, Illinois

Fund American Investment Management Co.
650 California St.
San Francisco, California

The Massachusetts Co., Inc.
70 Federal St.
Boston, Massachusetts

Loomis-Sayles & Co., Inc.
225 Franklin St.
Boston, Massachusetts

Scudder, Stevens & Clark, a partnership
10 Post Office Sq.
Boston, Massachusetts

Stein Roe & Farnham, a partnership
135 South LaSalle St.
Chicago, Illinois

Arnold Bernhard & Co., Inc.
5 East 44th St.
New York, New York

Pioneer Management Corp.
60 State St.
Boston, Massachusetts

Ralph E. Samuel & Co., a partnership
55 Broad St.
New York, New York

(c) The following defendants are directors or trustees of defendant externally managed mutual funds and directors or partners of defendant investment advisers ("self-dealing directors"), each of whom is sued individually, as a co-conspirator, as a self-dealing director and as a representative of all other self-dealing directors similarly situated.

Set forth below the names of the self-dealing directors are defendant externally managed mutual funds and defendant investment advisers with which they are affiliated.

HOWARD M. STEIN
THE DREYFUS FUND, INC.
THE DREYFUS CORP.

STUART F. SHILOWAY
INVESTORS MUTUAL, INC.
INVESTORS STOCK FUND, INC.
INVESTORS VARIABLE PAYMENT FUND, INC.
INVESTORS DIVERSIFIED SERVICES, INC.

WALTER L. MORGAN
WELLINGTON FUND, INC.
WINDSOR FUND, INC.
WELLINGTON MANAGEMENT CO.

ROBERT S. DRISCOLL
AFFILIATED FUND, INC.
LORD, ABBETT & CO.

JOE JACK MERRIMAN
UNITED FUNDS, INC.
UNITED ACCUMULATIVE FUND
UNITED INCOME FUND
UNITED SCIENCE FUND
WADDELL & REED, INC.

JOHN R. HAIBE
FUNDAMENTAL INVESTORS, INC.
DIVERSIFIED GROWTH STOCK FUND, INC.
DIVERSIFIED INVESTMENT FUND, INC.
ANCHOR CORP.

Edward C. Johnson, II
Fidelity Trend Fund, Inc.
Fidelity Fund, Inc.
Puritan Fund, Inc.
Fidelity Capital Fund, Inc.
Dow Theory Investment Fund, Inc.
Fidelity Management & Research Co.

Jonathan B. Lovelace
The Investment Company of America
American Mutual Fund, Inc.
Capital Research & Management Co.

James H. Lemon
Washington Mutual Investors Fund, Inc.
Johnston, Lemon & Co.
Capital Research & Management Co.

Anthony R. Tyrone
Hamilton Funds, Inc.
Hamilton Management Corp.

John Hawkinson
Technology Fund, Inc.
Supervised Investors Services, Inc.

Francis S. Williams
Chemical Fund, Inc.
F. Eberstadt & Co.

Charles M. Werly
The George Putnam Fund of Boston
The Putnam Growth Fund
Putnam Investors Fund, Inc.
Putnam Management Co., Inc.

GERALD TSAI, JR.
MANHATTAN FUND, INC.
TSAI MANAGEMENT & RESEARCH CORP.

HUGH BULLOCK
DIVIDEND SHARES, INC.
BULLOCK FUND, LTD.
CALVIN BULLOCK, LTD.

PAUL C. CABOT
STATE STREET INVESTMENT CORP.
FEDERAL STREET FUND
STATE STREET RESEARCH & MANAGEMENT CO.

HENRY T. VANCE
BOSTON FUND, INC.
BOSTON MANAGEMENT & RESEARCH CO., INC.
VANCE, SANDERS & CO., INC.

THOMAS J. HERBERT
FINANCIAL INDUSTRIAL FUND, INC.
FINANCIAL PROGRAMS, INC.

PHILIP C. SMITH
NATIONAL SECURITIES SERIES
NATIONAL SECURITIES STOCK SERIES
NATIONAL SECURITIES GROWTH SERIES
NATIONAL SECURITIES & RESEARCH CORP.

WILFRED GODFREY
KEYSTONE CUSTODIAN FUNDS, INC.
KEYSTONE LOWER-PRICED COMMON STOCK FUND (S-4)
KEYSTONE GROWTH FUND (K-2)
KEYSTONE GROWTH COMMON STOCK FUND (S-3)
KEYSTONE INCOME COMMON STOCK FUND (S-2)
KEYSTONE INCOME FUND (K-1)

LOUIS K. HYDE, JR.
AXE-HOUGHTON FUND B, INC.
E. W. AXE & CO., INC.

HERBERT R. ANDERSON
GROUP SECURITIES, INC.
DISTRIBUTORS GROUP, INC.

CHARLES F. EATON, JR.
EATON & HOWARD STOCK FUND
EATON & HOWARD BALANCED FUND
EATON & HOWARD, INC.

ALLAN B. HUNTER
THE ONE WILLIAM STREET FUND, INC.
LEHMAN BROTHERS

CHARLES W. SHAEFFER
T. ROWE PRICE GROWTH STOCK FUND, INC.
T. ROWE PRICE & ASSOCIATES, INC.

T. ROWE PRICE
ROWE PRICE NEW HORIZONS FUND, INC.
ROWE PRICE MANAGEMENT CO., INC.

THOMAS A. MARTIN
CHANNING SHARES, INC.
CHANNING GROWTH FUND
CHANNING BALANCED FUND
VAN STRUM & TOWNE, INC.

JAMES H. OBR
THE COLONIAL FUND, INC.
COLONIAL MANAGEMENT ASSOCIATES, INC.

EDWARD P. RUBIN
SELECTED AMERICAN SHARES, INC.
SECURITY SUPERVISORS

FRED H. MERRILL
COMMONWEALTH INVESTMENT CO.
FUND AMERICAN INVESTMENT MANAGEMENT CO.

HENRY R. GUILD
MASSACHUSETTS FUND
THE MASSACHUSETTS CO., INC.

MAURICE T. FREEMAN
LOOMIS-SAYLES MUTUAL FUND, INC.
LOOMIS-SAYLES & CO., INC.

RONALD T. LYMAN, JR.
SCUDDER, STEVENS & CLARK COMMON STOCK FUND, INC.
SCUDDER, STEVENS & CLARK BALANCED FUND, INC.
SCUDDER, STEVENS & CLARK

HARRY H. HAGEY, JR.
STEIN ROE & FARNHAM BALANCED FUND, INC.
STEIN ROE & FARNHAM

ARNOLD BERNHARD
THE VALUE LINE SPECIAL SITUATIONS FUND, INC.
ARNOLD BERNHARD & CO., INC.

PHILIP L. CARRET
PIONEER FUND, INC.
PIONEERING MANAGEMENT CORP.

DONALD C. SAMUEL
ENERGY FUND, INC.
RALPH E. SAMUEL & CO.

(d) Defendant Investment Company Institute ("Institute") is an unincorporated association with its principal place of business at 61 Broadway, New York, New York. It is sued individually, as a co-conspirator, and as the trade association representative for defendant externally managed mutual funds and defendant investment advisers.

12. Each of the representative defendants [¶¶ 12(a), (b) and (c) *supra*] is representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure and this action is brought against each of them and each entire class of which they are representative.

13. (a) The externally managed mutual funds class consists of the defendant externally managed mutual funds and all other externally managed mutual funds affiliated therewith or related thereto.

(b) The investment advisers class consists of the defendant investment advisers and all other investment advisers affiliated therewith or related thereto.

(c) The self-dealing directors class consists of:

(i) the self-dealing directors;

(ii) all other individuals who contemporaneously are directors or trustees of the defendant externally managed mutual funds and directors or partners of defendant investment advisers; and

(iii) all other individuals who contemporaneously are directors or trustees of externally managed mutual funds affiliated with or related to defendant externally managed

mutual funds and directors or partners of investment advisers affiliated with or related to defendant investment advisers.

14. Each class is so numerous and geographically so widely distributed that joinder of all members is impracticable. There are questions of law and fact common to each class. The defenses of each class of representative defendants will be typical of the defenses of each class and each class of representative defendants will fairly and adequately protect the interests of that class.

15. The prosecution of separate actions against individual members of each class would create the risk of:

(a) inconsistent or varying adjudications in different jurisdictions with respect to individual members of each class; and

(b) adjudications with respect to individual members of each class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

16. The defendants and each of their respective classes have acted or refused to act on grounds generally applicable to plaintiff and the members of his class and, derivatively, to defendant externally managed mutual funds and the members of their class, thereby making appropriate final injunctive relief against defendants and each of their respective classes in favor of plaintiff and the members of his

class as a whole and, derivatively, in favor of the defendant externally managed mutual funds and the members of their class as a whole.

17. The questions of law and fact common to the members of each class predominate over any questions affecting only individual members and each class action is superior to other available methods for a fair and efficient adjudication of the controversy.

18. As used herein, "defendant" includes each of the above-named defendants and any predecessors in interest thereto.

C. *Facts Conferring Jurisdiction on This Court*

19. (a) Each defendant is an inhabitant of or is found in or transacts business in the District of New Jersey.

(b) The claim hereinafter alleged arose in the District of New Jersey.

(c) Jurisdiction is also based on the jurisdiction of this Court obtained under the other Counts of this Complaint.

D. *Facts Constituting the Cause of Action*

20. Each defendant herein is and at all times material to the Complaint has been engaged in the sale, redemption or management of externally managed mutual funds or mutual fund shares in interstate trade and commerce to customers throughout the United States.

21. Beginning at least as early as January 1, 1965, the exact date being unknown to plaintiff, and continuing to the

present as hereinafter alleged, all of the defendants and each of their respective classes engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in the sale, redemption or management of externally managed mutual funds or mutual fund shares in violation of Sections 1 and 2 of the Sherman Act (15 USC §§ 1 and 2).

22. At all times material to the Complaint, directors or trustees of each of defendant externally managed mutual funds have been affiliated with their respective investment advisers within the meaning of the Investment Company Act of 1940, 15 USC §§ 80a-1 *et seq.*

23. At all times material to the Complaint:

(a) the self-dealing and affiliated directors and their respective investment advisers have dominated and controlled their respective externally managed mutual funds and their personnel, policies and boards of directors.

(b) the self-dealing and affiliated directors have dominated and controlled their respective investment advisers and their personnel, policies and boards of directors; and

24. At all times material to the Complaint, the contracts and other forms of agreement between the defendant investment advisers and their respective externally managed mutual funds have not been either the subject or the result of arm's-length bargaining between them.

25. Pursuant to said contracts and other forms of agreement, defendant investment advisers receive for their respective investment advisory and management services a fee calculated solely on the basis of their respective mutual funds' average net assets ("management fees").

26. For fiscal years ended on or nearest to December 31, 1967, the defendant investment advisers received management fees from their defendant externally managed mutual funds, the exact figures being presently unknown to plaintiff, in the aggregate substantially in excess of $90 million dollars. The members of the defendant investment advisers class received additional management fees from externally managed mutual funds affiliated with or related to defendant externally managed mutual funds for the same periods.

27. Said management fees are not related, nor have they been related, either to the services performed by defendant investment advisers or to the performance of their externally managed mutual funds, and are grossly excessive.

28. The combination and conspiracy involved in this action consisted and consist of a continuing agreement, understanding and concert of action, *inter alia*, between and among:

(a) each externally managed mutual fund and its respective investment adviser;

(b) each externally managed mutual fund and its self-dealing directors;

(c) each self-dealing director and his respective investment adviser;

(d) the self-dealing directors;

(e) the members of the externally managed mutual funds class;

(f) the members of the investment advisers class;

(g) the self-dealing directors class;

(h) each member of the externally managed mutual funds class and the Institute;

(i) each member of the investment advisers class and the Institute;

(j) each member of the self-dealing directors class and the Institute; and

(k) the members of the externally managed mutual funds, investment advisers and self-dealing directors classes and the Institute.

29. The substantial terms of the aforesaid combination and conspiracy were and are to:

(a) fix and adopt similar schedules of grossly excessive management fees unrelated to the services performed by investment advisers and the performance of the externally managed mutual funds;

(b) maintain and stabilize prices for the services performed by investment advisers by adherence to said similar schedules of management fees;

(c) refrain from competing for the business of externally managed mutual funds or the business of investment advisers;

(d) refrain from causing externally managed mutual funds from providing for investment advisory or management services internally; and

(e) otherwise to fix prices in, monopolize, and attempt to monopolize, the management market.

30. All of the defendants and each of their respective classes have acquiesced, encouraged, cooperated and assisted in the effectuation and maintenance of the aforesaid combination and conspiracy.

31. Various other corporations, individuals and entities who are neither defendants nor members of defendant classes herein, their identity being presently unknown to plaintiff, participated and are participating as co-conspirators in the aforesaid combination and conspiracy and performed acts in furtherance thereof.

32. By reason of the aforesaid combination and conspiracy, plaintiff and each member of his class and defendant externally managed mutual funds and each member of their class have paid substantially more for investment advisory and management services than they would have paid had the aforesaid combination and conspiracy not existed and will continue to do so unless defendants are enjoined as prayed herein.

33. As a result of the aforesaid combination and conspiracy, plaintiff and each member of his class and defendant externally managed mutual funds and each member of their class have been substantially injured and damaged

by defendants in an amount which is presently undetermined.

WHEREFORE, plaintiff demands:

1. (a) Judgment in his favor and in favor of each member of the class represented by him in threefold the amount of the damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees;

(b) Derivatively, judgment in favor of defendant externally managed mutual funds and in favor of each member of the class represented by them in threefold the amount of the damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

2. Final injunctive relief enjoining and restraining defendants from continuing to pay or receive grossly excessive management fees or fees calculated solely on the basis of the average net assets of any of their externally managed mutual funds; and

3. Such other and further relief as may be necessary and appropriate.

COUNT TWO

34. This action is instituted under the Act of Congress of August 22, 1940, c. 686, Title I, 54 Stat. 789, as amended (15 USC §§ 80a-1 *et seq.*) ("Investment Company Act of 1940") for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against the defendants for the injuries sustained by plaintiff and

members of the class represented by him and, derivatively, by defendant externally managed mutual funds and members of the class represented by them by reason of defendants' violations as hereinafter alleged of Sections 1 (15 USC § 80a-1), 10 (15 USC § 80a-10), 15 (15 USC § 80a-15), 17 (15 USC § 80a-17), 36 (15 USC § 80a-35) and 37 (15 USC § 80a-36) of the Investment Company Act of 1940.

E. Parties

35. Paragraphs 2 through 18 of Count One of this Complaint are incorporated herein by reference.

F. Jurisdiction

36. (a) Each defendant is an inhabitant of or is found in or transacts business in the District of New Jersey.

(b) In connection with the acts, combination and conspiracy alleged herein, acts and transactions occurred in the District of New Jersey.

(c) Jurisdiction is also based on the jurisdiction of this Court obtained under the other Counts of this Complaint.

G. The Cause of Action

37. Paragraph 20 of Count One of this Complaint is incorporated herein by reference.

38. Beginning at least as early as January 1, 1965, the exact date being unknown to plaintiff, and continuing to the present as hereinafter alleged, all of the defendants and each of their respective classes unlawfully combined and conspired, and unlawfully acted individually, in con-

nection with the sale, redemption or management of externally managed mutual funds or mutual fund shares in violation of Sections 1, 10, 15, 17, 36 and 37 of the Investment Company Act of 1940.

39. Paragraphs 22 through 31 of Count One of this Complaint are incorporated herein by reference.

40. Pursuant to agreement, brokers who execute portfolio transactions for defendant externally managed mutual funds ("executing brokers") at the direction of their respective investment advisers execute such transactions for less than the commission paid to them, in such cases giving up the balance to brokers ("non-executing brokers") (commonly known as "give-ups").

41. Although management fees are paid to defendant investment advisers for the purpose of providing total (here grossly excessive) compensation for their services on behalf of their respective externally managed mutual funds, the investment advisers obtain additional compensation by allocating portions of executing broker commissions to non-executing brokers who provide such investment advisers with investment advisory and management services either for no charge or at a discount (commonly known as "reciprocals").

42. Except in the cases of defendants Investors Diversified Services, Inc. and Waddell & Reed, Inc.:

(a) None of the "give-ups" or "reciprocals" is used to reduce the management fees of the defendant investment advisers.

(b) None of the "give-ups" or "reciprocals" is returned to the defendant externally managed mutual funds.

43. The practice of "give-ups" and "reciprocals" results in compensation to defendant investment advisers that exceeds the already grossly excessive amounts provided for in the investment advisory and management contracts and other forms of agreement.

44. The practice of "give-ups" and "reciprocals" results, *inter alia*, in compensation to defendant investment advisers that exceeds the compensation permitted by the Investment Company Act of 1940.

45. The payment to and receipt by defendant investment advisers of the management fees, "give-ups" and "reciprocals", and defendants' refusal to cause defendant externally managed mutual funds to provide internal investment advisory or management services has constituted and will continue to constitute:

(a) willful and unlawful conversion by defendants of the assets of defendant externally managed mutual funds and their shareholders to their personal use and benefit in violation of the Investment Company Act of 1940;

(b) gross abuse of trust, gross misconduct, willful misfeasance, bad faith, gross negligence and breach of their fiduciary duties by defendants in violation of the duties imposed upon them, expressly and by neces-

sary implication, by the Investment Company Act of 1940; and

(c) violations of Sections 1, 10, 15, 17, 36 and 37 of the Investment Company Act of 1940.

46. In connection with and in furtherance of the aforesaid combination and conspiracy, as well as individually, defendants, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails, engaged in acts, practices, courses of business and manipulative and deceptive devices and contrivances, all constituting and operating as a fraud and deceit upon plaintiff and each member of his class and upon defendant externally managed mutual funds and each member of their class.

47. In connection with and in furtherance of the aforesaid combination and conspiracy, as well as individually, defendants, directly and indirectly, used the means and instrumentalities of interstate commerce and the mails and facilities of national securities exchanges.

48. By reason of the aforesaid combination and conspiracy as well as the aforesaid individual acts, plaintiff and each member of his class and defendant externally managed mutual funds and each member of their class have paid substantially more for investment advisory and management services than they would have paid had the aforesaid combination and conspiracy not existed and will continue to do so unless defendants are enjoined as prayed herein.

49. As a result of the aforesaid combination and conspiracy as well as the aforesaid individual acts, plaintiff and each member of his class and defendant externally managed mutual funds and each member of their class have been substantially injured and damaged by defendants in an amount which is presently undetermined.

WHEREFORE, plaintiff demands:

1. (a) Judgment in his favor and in favor of each member of the class represented by him in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees;

(b) Derivatively, judgment in favor of defendant externally managed mutual funds and in favor of each member of the class represented by them in the amount of the damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

2. Final injunctive relief enjoining and restraining defendants from continuing to pay or receive "give-ups", "reciprocals" and grossly excessive management fees or fees calculated solely on the basis of the average net assets of any of their externally managed mutual funds; and

3. Such other and further relief as may be necessary and appropriate.

COUNT THREE

50. This action is instituted under:

(a) the Act of Congress of June 6, 1934, c.404, 48 Stat. 881, as amended (15 USC §§ 78a *et seq.*) ("Securi-

ties Exchange Act of 1934") for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against the defendants for the injuries sustained by plaintiff and the members of the class represented by him and, derivatively, by defendant externally managed mutual funds and members of the class represented by them by reason of defendants' violations as hereinafter alleged, of Section 14(a) (15 USC § 78n) of the Securities Exchange Act of 1934 and Rule 14a-9 (17 CFR § 240.14a-9) adopted thereunder;

(b) the Act of Congress of August 22, 1940, c.686, Title II, 54 Stat. 847, as amended (15 USC §§ 80b-1 *et seq.*) ("Investment Advisers Act of 1940") for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against the defendants for the injuries sustained by plaintiff and members of the class represented by him and, derivatively, by defendant externally managed mutual funds and members of the class represented by them by reason of defendants' violations as hereinafter alleged of Section 206 (15 USC § 80b-6) of the Investment Advisers Act of 1940; and

(c) the Investment Company Act of 1940 for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against the defendants for the injuries sustained by plaintiff and members of the class represented by him and, derivatively, by defendant externally managed mutual funds and members of the class represented by them by reason of defendants' violations as hereinafter alleged of

Sections 20 (15 USC § 80a-20) and 34 (15 USC § 80a-33) of the Investment Company Act of 1940.

H. *Parties*

51. Paragraphs 2 through 18 of Count One of this Complaint are incorporated herein by reference.

I. *Jurisdiction*

52. Paragraph 36 of Count Two of this Complaint is incorporated herein by reference.

J. *The Cause of Action*

53. Paragraph 20 of Count One of this Complaint is incorporated herein by reference.

54. Beginning at least as early as January 1, 1965, the exact date being unknown to plaintiff, and continuing to the present as hereinafter alleged, all of the defendants and each of their respective classes unlawfully combined and conspired, and unlawfully acted individually, in connection with the sale, redemption or management of externally managed mutual funds or mutual fund shares in violation of Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 adopted thereunder, Section 206 of the Investment Advisers Act of 1940 and Sections 20 and 34 of the Investment Company Act of 1940.

55. Paragraphs 22 through 31 of Count One of this Complaint are incorporated herein by reference.

56. Paragraphs 40 through 47 of Count Two of this Complaint are incorporated herein by reference.

57. In connection with and in furtherance of the aforesaid combination and conspiracy, as well as individually, defendants have participated in the preparation and issuance of proxy statements, and other announcements, releases, reports and statements, which are in violation of Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 adopted thereunder, Sections 206 of the Investment Advisers Act of 1940 and Sections 20 and 34 of the Investment Company Act of 1940, in that they make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, *inter alia*, by failing to disclose, or by making false disclosures with respect to, the facts set forth in paragraphs 23, 24, 27-29 and 40-46.

58. Paragraphs 48 and 49 of Count Two of this Complaint are incorporated herein by reference.

WHEREFORE, plaintiff demands:

1(a). Judgment in his favor and in favor of each member of the class represented by him in the amount of the damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees;

(b) Derivatively, judgment in favor of defendant externally managed mutual funds and in favor of each member of the class represented by them in the amount of the damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

2. Final injunctive relief enjoining and restraining defendants from continuing to pay or receive "give-ups", "reciprocals" and grossly excessive management fees or fees calculated solely on the basis of the average net assets of any of their externally managed mutual funds; and

3. Such other and further relief as may be necessary and appropriate.

/s/ HAROLD E. KOHN
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Atlantic City, New Jersey 08401
Attorneys for Plaintiff

Notice of Motion by Defendants Investors Diversified Services, Inc., et al. for an Order Dismissing Complaint

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

[SAME TITLE]

To:

JOSEPH B. KAUFFMAN, ESQUIRE
Attorney for Plaintiff
1421 Atlantic Avenue
Atlantic City, New Jersey 08401

PLEASE TAKE NOTICE that the undersigned defendants will, on a date to be fixed by the Court, make motions for the following orders:

(1) Pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, dismissing the action on the grounds that, on the face of the Complaint, plaintiff does not fairly and adequately represent the interests of the funds or their shareholders;

(2) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing all claims asserted individually, or representatively on behalf of individual shareholders, on the ground that all of the claims asserted are necessarily derivative in nature;

(3) Pursuant to Rules 12(b)(6), 23 and 23.1 of the Federal Rules of Civil Procedure, dismissing each of

Notice of Motion by Defendants Investors Diversified Services, Inc., et al. for an Order Dismissing Complaint

Counts I, II and III to the extent they seek relief (a) on behalf of funds of which plaintiff is not a shareholder, and (b) on behalf of shareholders of funds of which plaintiff is not a shareholder, on the ground that a party may not maintain an action on behalf of a corporation, or shareholders of a corporation, unless he himself is a shareholder of that corporation;

(4) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing Counts II and III for failure to state a claim upon which relief can be granted on the ground the conspiracy alleged therein does not constitute a violation of the statutes under which relief is sought;

(5) Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, dismissing the action on the ground that the Court does not have jurisdiction over the persons of defendants;

(6) Pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, dismissing the action on the ground that it was brought and is pending in the wrong district;

(7) Pursuant to Rule 12(b)(4) of the Federal Rules of Civil Procedure, dismissing the action on the ground of insufficiency of process;

(8) Pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, dismissing the action on the ground of insufficiency of service of process;

Notice of Motion by Defendants Investors Diversified Services, Inc., et al. for an Order Dismissing Complaint

(9) Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Complaint and each count thereof on the ground that it fails to state a claim upon which relief can be granted; and

(10) For such other and further relief as to the Court may be just and proper.

PLEASE TAKE FURTHER NOTICE that the defendants will make, on a date to be fixed by the Court, all other motions described as "Second Group" and "Third Group" in Attachment B to the "Proposed Agenda for Conference of April 18, 1969", heretofore filed herein.

Respectfully submitted,

Dated:
Camden, New Jersey
April 25, 1969.

[SIGNATURES OMITTED]